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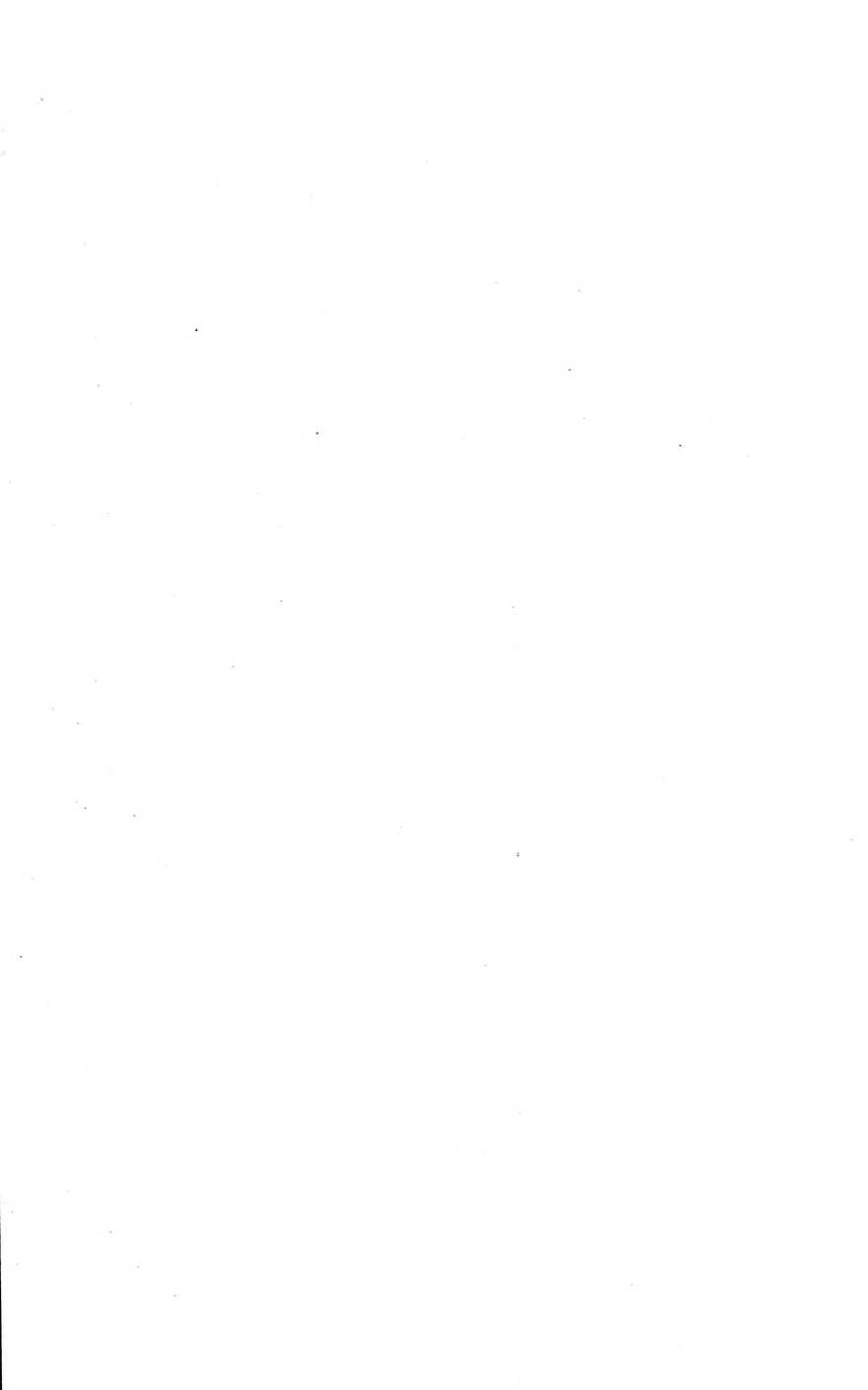


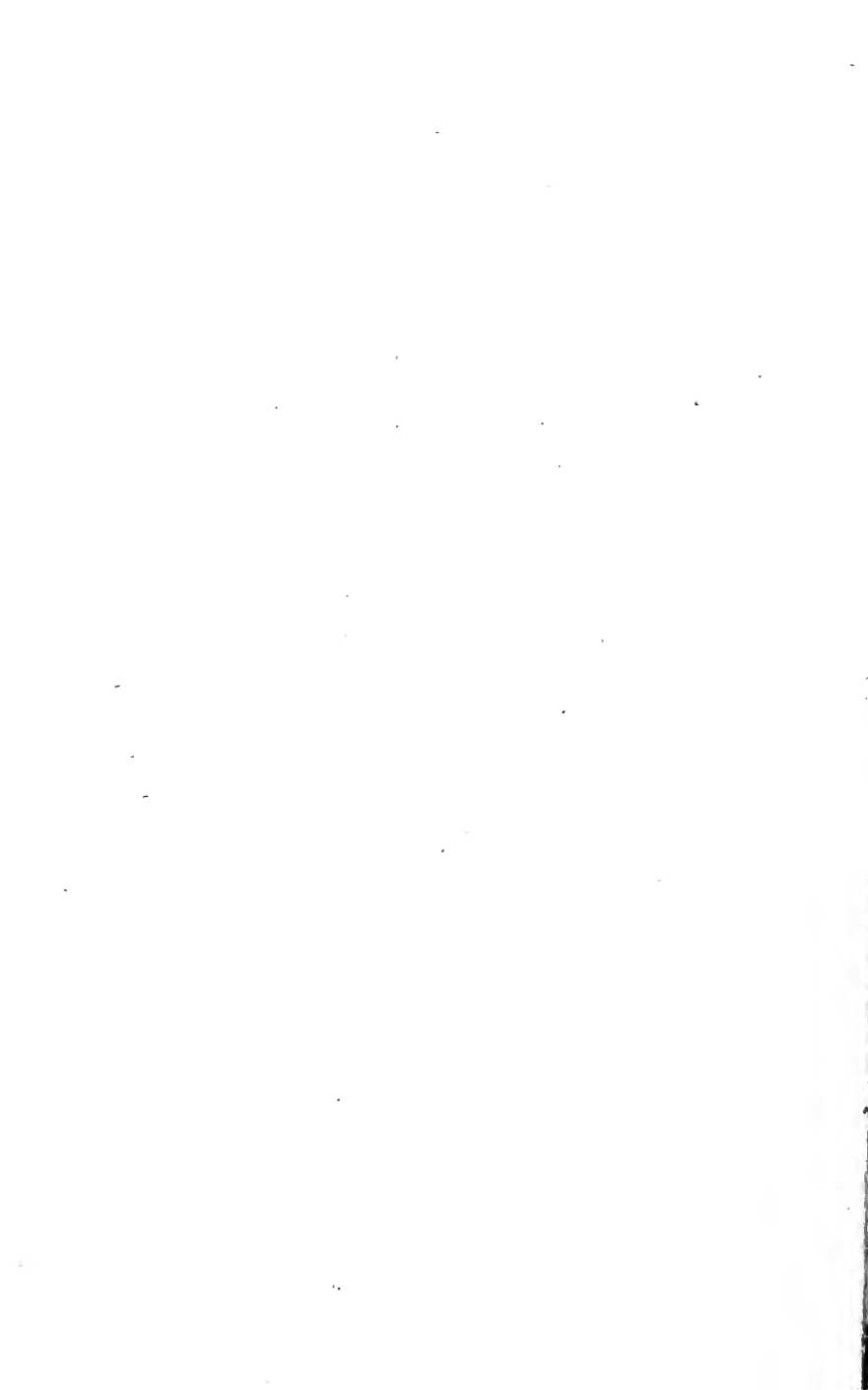
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AN
E S S A Y
ON THE
NATURE AND OPERATION
OF
Fines and Recoveries.

BY WILLIAM CRUISE, Esq.
OF LINCOLN'S-INN, BARRISTER AT LAW.

THE THIRD EDITION,
Revised, corrected, and enlarged.

IN TWO VOLUMES.

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Fines.

CHAPTER I.

Of the Origin and Antiquity of Fines.

1. **W**HEN landed property first became the subject of alienation, it was found necessary to adopt some authentic mode of transfer, which might secure the possession, and evince the title of the purchaser. *Origin of Fines.*

By the ancient common law a charter of feoffment was in general the only written instrument, whereby lands were transferred or conveyed; but although this assurance derived great authenticity from the number of witnesses by whom it was usually attested, and the solemn and public manner in which livery of seisin was usually given: yet still it may be supposed that inconveniences would frequently arise, either from the loss of the charter itself,

Chap. I.

or from the difficulty of proving it after a lapse of years. These circumstances probably induced men to look out for some other species of assurance which should be more solemn, more lasting, and more easy to be proved than a charter of feoffment.

2. Experience must soon have discovered that no title could be so secure and notorious, as that which had been questioned by an adverse party, and ratified by the determination of a Court of Justice: and the ingenuity of mankind soon found out a method of deriving the same advantages from a fictitious process.

To effect this purpose the following plan was adopted; a suit was commenced concerning the lands intended to be conveyed, and when the writ was sued out, and the parties appeared in Court, a composition of the suit was entered into with the consent of the Judges, whereby the lands in question were acknowledged to be the right of one of the contending parties.

3. This agreement being reduced into writing, was inrolled among the records of

of the Court, where it was preserved by the public officer; by which means it was not so liable to be lost (a) or defaced as a charter of feoffment, and being a record would at all times prove itself. It had also another advantage, that being substituted in the place of the sentence, which would have been given in case the suit had not been compounded, it was held to be of the same nature, and of equal force with the judgment of a Court of Justice.

4. When this species of agreement was completed, a writ issued of course to the sheriff of the county in which the lands lay, in the same form as if a judgment had been obtained in an adversary suit, directing him to deliver the possession to the person who thus acquired the lands.

Glanv. lib. 2.
c. 20 Bract.
256. a. & b.

5. The form which was first adopted in this species of assurance has continued ever since. To shew the tenor thereof, and the

(a) There is a record of a fine in *Dugdale's Origines Juridicales*, p. 92. dated 28 Hen. 2. anno 1182. which is expressly mentioned to have been levied, because the charter of feoffment by which the lands had been conveyed, was lost.

Chap. I.



difference between it and the charters which were then in use I shall transcribe it.

Glan. lib. 8.
c. 2.

Hæc est finalis concordia facta in curia Domini Regis apud Westmonasterium, in vigilia beati Petri Apostoli, anno regni Regis Henrici Secundi, tricesimo tertio, coram Ranulpho de Glanville, Justiciario Domini Regis, et coram H. R. W. and T. & aliis fidelibus Domini Regis qui ibi tunc aderant, inter priorem et fratres hospitalis de Hierusalem, & W. T. filium Normanum & Alanum filium suum, quem ipse attornavit in curia Domini Regis ad lucrandum & perdendum, de tota terra illa & de pertinentiis de qua terra tota placitum fuit inter eos in curia Domini Regis; scilicet quod prædictus W. & Alanus concedunt & testantur donationem quam Normanus pater ipsius W. ipsis inde fecit, & illam terram totam quietam clamant de se et hæredibus suis domus hospitalis et prefato priori et fratribus in perpetuum, tenenda de domo hospitali & prædicto priori et fratribus in perpetuum et per liberum servitium quatuor denariorum per annum pro omni servitio, et pro hac concessione & testificatione & quietâ clamantia prefatus prior et fratres

fratres hospitalis dederunt ipsi Wilhelmo & Alano centum solidos sterlingorum.

Chap. I.

6. This species of assurance was called *Finis*, or *Finalis Concordia* from the words with which it began, and also from it's effect which is to put a final end to all suits and contentions (*b*). It may be defined to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the Judges, and inrolled among the records of the Court, where the suit is commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements (*c*).

7. To

(*b*) *Et nota quod dicitur talis concordia finalis, eo quod finem imponit negotio, adeo ut neuter litigantium ab ea de cetero poterit recedere. Glan. lib. 8. c. 3. Finis est extremitas uniuscujusque rei, et ideo dicitur finalis concordia quia imponit finem litibus. Bract. 435.*

(*c*) *Finis primo dicitur ritus ille solennis transferendorum prædiorum in curia regis civilium causarum quo nihil sanctius habetur vel augustius ad alienationes et hereditates stabilendas.—Transfusionis igitur coram rege duo erant genera, unum simplici ejus charta enuntiatio et testatur,*

Chap. I.



Ante f. 4.

7. To this mode of transferring estates of freehold at common law, the ceremony of livery of seisin is unnecessary; not because the supposition and acknowledgement thereof in a Court of Record induced an equal notoriety, for in the antient fines no such acknowledgement is made: but because lands acquired in this manner were supposed to be recovered by sentence of a Court of Justice, and the possession was delivered by the sheriff, in pursuance of a writ directed to him for that purpose, which was equal in point of notoriety to the ceremony of livery.

8. A fine was from it's first institution more highly favoured and protected by the law than any other kind of conveyance; for if either of the parties refused to adhere to it, there was a particular writ by which they were compelled to appear, called

aliud tamquam e composita lite proveniens rei judicate formam exhibet ideoque finis dictum quasi litis terminus. Sed genus alterum (qui finis dicitur et finalis concordia) magis placuit quod præter testionis magnificentiam, non solum ad stabiliendas transactiones, sed ad rescindendas lites maxime valet, ideoque ab emptoribus terrarum tamquam sacra anchora culta et admirata.—Spelman's Gloss. voce Finis.

Querela

Querela de Fine facto in curia domini regis non observato. And if the fine was proved to have been duly levied, then the party who refused to adhere to it, was attached, until he found sufficient security for his compliance (d).

Chap. I.

Glan. lib. 1.
c. 3. lib. 8.
c. 3, 4, 5.

9. The idea of a fine appears to have been originally taken from the *transactio* of the Civilians, which was an accommodation of a suit already commenced, or an agreement respecting some doubtful matter, that would otherwise become the subject of a suit. *Transactio est super re dubia, aut lite incerta, conventio non gratuita, aliquo dato retento vel promisso.*

Fines taken from the civil law.

Voet. Comp. Jurif. p. 51.

10. Although no modern writer on the *English* law has taken notice of this circumstance, yet the definition of a fine given by *Bracton*, seems to be an undoubted proof of it.

(d) In some cases, however, the civil authority was insufficient for this purpose. Thus, Mr. *Madox* has transcribed a record, by which it appears that *Julian de Swadefeld*, fined to king *John* in 100 marks and six palfreys, *per sic quod finis factus per cyregraphum et per finem duelli, inter ipsam, et Wilhelmum de Curton, de feodo unius militis et dimidii cum pertin: in Ellingebam coram iusticiariis teneatur.*

Chap. I.

Bract. fo.
310. a & b.

Concordia in foro seculari idem est quod transactio, et est transactio de re dubia, et lite incerta, aliquo dato vel promisso vel retento, a lite transactio.

Vide Glan.
Prolog. et
lib. 7. c. 1.
Seldon ad
Fletam,
Barrington
Observ. on
the Statutes,
1 Reeves 68.

From the similarity of these definitions, it appears clearly that the *English* lawyer copied from the *Roman*; nor should it appear extraordinary that we are indebted to the civil law for this most useful species of assurance, when we consider how much our first writers *Glanville* and *Bracton* have borrowed from *Justinian's* code, although some of the more modern authors appear, either to have been ignorant of the obligations we owe to the *Romans* in this respect, or to have, from a mistaken pride, been extremely unwilling to acknowledge them (*e*).

11. The *English* were not the only people who adopted the *transactio* of the civil law, for the *French* seem to have

(*e*) Sir *Edward Coke* seems not to have been totally ignorant of the origin of fines; for speaking of their etymology, he says, "And the civilians call this judicial concord *Transactionem judicialem de re immobili.*" 1 Inst. 262. a.

very early felt the superior efficacy of this kind of contract over every other, and therefore introduced it into their law.

Chap. I.

On nomme transaction les actes qui ont pour objet de terminer ou prévenir des procès, auxquels les droits respectifs pouvoient donner lieu.

Denifart
Coll. de Decisions.

Il n'y a point de conventions plus solidis ni d'engagements plus respectables que ceux garrantis par une transaction sur procès: les loix les adoptent et les protègent, parcequ'elles sont importantes a la société; et que leur but naturel est, de delivrer les parties du trouble que produit l'évenement des procès, de faciliter les reconciliations, d'affurer le sort et l'état des citoyens, et de tarir la source de toute dissension.

Quelque-fois la transaction se faisoit au parlement même, comme on voit au second registre olim fo. 25 vo. ou il est dit, Ilac est concordia facta inter Petrum Episcopum Altisiodorensensem et Procuratorem Comitum Altisiodorensium.

12. No traces of a *transactio* or *fine* are to be found in the original customs of the duchy

Chap. I.

Basnage vol.
2. p. 346.

*Antiquity of
Fines.*

Coke Read 1.
Plowd. 368.

duchy of *Normandy*, but it seems to have been introduced very early into their law; for in the *Coutume réformée de Normandie*, which was compiled in the year 1583, mention is made of a *contrat de transaction*, as a thing well known and in common use (*f*).

13. It has been a favourite topic with our lawyers to enlarge very much on the antiquity of fines; some have carried this idea so far as to insist, that they were co-eval with the first rudiments of the law,

(*f*) Agreements in the nature of fines were formerly known in *Scotland*. “In difficult or intricate cases it was an early practice for Judges to interpose, by pressing a transaction between the parties; of which we have some instances in the Court of Session, not far back. This practice brought about many agreements betwixt litigants, which were always recorded in the Court where the process depended. The record was complete evidence of the fact; and if either party broke the concord or agreement, a decree went against him without other proof. The singular advantages of a concord or transaction, thus finished in face of Court, moved individuals to make all their agreements of any importance in that form. And indeed, while writing continued a rare art, skilful artists, except in Courts of Justice, were not easily found, who could readily take down a covenant in writing.” *Lord Kaims’s Law Tracts*, 65.

and

and formed an original conveyance or assurance. Others have contended, that fines were well known in this kingdom before the *Norman* conquest (g); but if it be admitted that the first idea of a fine was derived from the civil law, and we trust this fact has been fully proved; it will follow that fines could not possibly have been known in *England* until some time after the year 1130, when a copy of the *Pandects* was found at *Amalphi* in *Italy*; in consequence of which discovery, the study of the *Roman* law spread with uncommon rapidity over all *Europe*, not excepting this island, in which *Roger*, surnamed *Vacarius*, who was brought over by *Theobald*, a *Norman* abbot, elected to the See of *Canterbury* so early as the year 1147, read public lectures at *Oxford* on the *Roman* law.

Selden ad
11-tam.
chap. 7. f. 3.

(g) It was not unusual in the *Anglo Sax* a times for persons to execute their contracts in the County Court where they were witnessed, of which *Hicks* in his *Dissertatio Epistolari*, p. 29, 30 published in the *Thesaurus Linguarum Septentrionalium*, has produced two instances, but they bear no sort of resemblance to fines.

Chap. I.



Dugd. Orig.
Jurisd. 92.
Madox Diff.
to the For-
mul. Angl.
f. 15.

As a farther proof of this assertion it may be observed, that *Dugdale* and *Madox*, the two most diligent and learned enquirers into our antient records and charters, have acknowledged, that they could not discover any traces of fines in this country before the reign of *Hen. II.* who ascended the throne of *England* in the year 1155, which was eight years after *Vacarius* had publicly taught the *Roman* law at *Oxford*: and *Glanville* in whose time fines were fully established, is not supposed to have written before the year 1181, that is thirty-four years after the introduction of the *Roman* jurisprudence; so that there can scarce remain a doubt but that fines were first adopted in *England*, during the reign of *Stephen*, or his immediate successor, *Henry II.* and that we are indebted to *Justinian's* code for this part of our law.

CHAPTER II.

Of the Manner of levying Fines.

14. **A** FINE has in the preceding *Antient manner of levying fines.* chapter been described to be an amicable agreement or composition of a suit, whether real or fictitious, between the demandant and tenant, with the consent of the Judges, and inrolled among the records of the Court where the suit was commenced; by which lands and tenements are transferred from one person to another, or any other settlement is made relating to lands and tenements.

15. There is no small difficulty in ascertaining the manner in which fines were originally levied, on account of the scarcity of materials for such an enquiry; for except what is to be found in the dissertation which *Madox* has prefixed to his collection of antient charters, and the few observations which *Dugdale* in his *Origines Juridicales* has made on this subject, nothing has been collected either by our lawyers or antiquaries.

16. *Madox*

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16. *Madox* seems to have thought, that a fine was not originally an accommodation of a suit in the strict sense of the word, because in some of the most ancient fines extant, no original writ appears to have been sued out, nor any process used for the purpose of bringing the parties before the Court: but they themselves having accommodated the matters in dispute, and drawn up an agreement in writing called a *Chirographum*, which signified a deed of two parts written on the same paper or parchment, they then appeared in a Court of Justice, where they acknowledged it as their agreement, and mutually set their seals to it; and upon payment of a certain fine it was inrolled among the records of the Court. Or else the parties entered into an agreement in Court, where it was immediately reduced into the form of a *Chirographum*, and recorded, a copy of which was delivered to each of the parties.

1 Inst. 143.
b n. 4.
Fleta l. 3.
c. 14. f. 3.
3 Rep. Pref.

Year Book
1454.
21 Ed. 4.
fo. 4. No. 8.
Mich. 21 Ed.
4. fo. 60.
No. 32.

This idea is confirmed by the opinion of the Judges in the Abbot of *Merton's* case, who said that a fine was nothing more than a covenant between the parties and recorded by the justices, and if it
were

were before justices of record, the parties being present, it was sufficient, for the writ was sued out only to make the parties appear, and if they were present and would appear gratis, it was unnecessary to sue out a writ, but they might make a final covenant by record of the justices, and a fine was but a covenant of record, from whence it may be contended that fines were at first exactly similar to the agreements which in the time of the *Anglo-Saxons* were entered into at the county courts. But a fine is distinguished from those agreements by two very material circumstances, First, nothing appears to have been paid for permission to enter into such a contract, and Secondly, it was not inrolled among the records of the Court.

It may also be observed that this mode of levying a fine without an original writ agrees exactly with the *transactio* of the civil law, which was not always an accommodation of a suit actually commenced, but an agreement relating to some doubtful matter, which must otherwise have become the subject of litigation. *Objectum five materia transactionis sunt res dubie vel*

Vinnius's
Tract. de
Transl. c. 4.
n. 1.

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litigiosæ, de quibus scilicet vel nunc lis fit, vel in futurum esse possit, aut metuatur, nam litem motam esse nihil necesse est.

Brañt. 413. b.

17. The observation of the judges in the abbot of *Merton's* case, may also be accounted for on another principle. An original writ was not absolutely necessary in *Brañton's* time to the commencement of a suit, for if the defendant would appear in court without a writ, the judges might proceed in the suit, *tot erunt formulæ brevium quot sunt genera actionum, quia non potest quis sine brevi agere, cum non teneatur alius sine brevi respondere nisi gratis voluerit, et ex hoc ei non injuriatur, cum scienti et volenti non fit injuria.*

Lib. 2. c. 34.

The law was however soon altered in this respect, for when *Fleta* wrote, an original writ was become absolutely necessary:—thus in speaking of the court of common pleas, he says—*Habet etiam curiam suam et justiciarios suos residentes qui omnes recordum habent in his quæ coram eis fuerunt placitata, et qui potestatem habent de omnibus placitis et actionibus realibus et personalibus et mixtis, dum tamen warrantum per breve regis habuerint cognoscendi, nam sine warranto*

ranto jurisdictionem non habent neque cobertionem.

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18. It seems however to have been very soon established that no fine could be levied, unless upon a *placitum* or suit actually commenced in the usual manner, for *Glanville* describes a fine to be an accommodation of a suit actually commenced. *Con-*

Glan. l. 8.

c. 1.

tingit autem multoties loquelas motas in curia domini regis per amicabilem compositionem et finalem concordiam terminari, sed ex consensu et licentia domini regis, vel ejus justiciariorum undecunque fuerit placitum, sive de terra sive de alia re. It even appears that so early as the reign of *Hen. III.* there was a particular *placitum* adapted to the purpose of levying a fine; thus *Madox* has transcribed a fine levied in the 27 *Hen. III.* between *Ranulph*, abbot of *Ramsay*, and *Matthew de Layham*. *Unde placitum finis facti summonitum fuit inter eos in eadem curia (a).*

Dissert. f. 17.

19. The

(a) It was formerly a common practice for persons who had any cause of dispute, to appear before Parliament, and there to enter into an agreement concerning the matter in debate, to which they mutually promised to adhere. Although these agreements are called *concordia*, yet they are clearly distinguishable

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Modern manner of levying fines.

2 Inst. 510.
13 Vin. Ab.
212.

19. The modern manner of levying fines was ascertained by the statute *de modo levandi fines*, 18 Edw. 1. st. 4. by which it was enacted that no fine should thenceforth be levied unless upon a suit actually commenced in the usual way; so that a fine then became an accommodation of a suit in the most strict and technical sense; and since the passing of that act, no material alteration has been made in the manner of levying fines.

5 Rep. 38. b.

20. A fine now consists of five parts.
1. The original writ. 2. The *licentia concordandi*. 3. The concord. 4. The note; and 5. The foot, chirograph or indenture.

Original writ.
2 Comm. 349.
5 Rep. 38. b.

21. When the parties have agreed to levy a fine, the person to whom the land is

from fines, for in the several agreements of this kind, which are to be found in the rolls of Parliament, no mention is ever made of a suit depending between the parties at the time, nor does any fine appear to have been paid on such occasions; the words of these concords are, *tandem ad instantiam Domini Regis ad istud Parliamentum suum qui omnes contentiones vult pacificare partes prædicti se in hunc modum concordarunt, videlicet, &c.* Rot. Parl. 18 Ed. 1. No. 2. No. 21. 20 Ed. 1. No. 23.

to be conveyed, commences an action or suit at law against the vendor, by suing out a writ of covenant against him, the foundation of which is a supposed agreement or covenant that the vendor shall convey the lands to the purchaser; on the breach of which agreement the action is brought.

As no suit can be commenced in any of the courts of common law without an original writ, and as a fine is a friendly composition of a suit actually commenced, it follows that no fine can be levied without an original writ; and the statute *de modo levandi fines* expressly says, "that the order of the common law will not suffer a fine to be levied in the king's court without an original." However if the judges permit a fine to be levied without an original writ, it is not absolutely void, but only voidable.

Co. Read. 10.
2 Inst. 513.

22. A fine may be levied on every writ by which lands may be demanded, charged, or bound; or which in any sort concerns land. Such as a writ of mesne, *warrantia*

5 Rep. 39. a.
Salk. 340.
Rep. temp.
Holt 322.
Shep. Tou. 4.
(b)

(b) The references made to *Sheppard's Touchstone*, are to the last edition of that valuable work, which has been published by Mr. Hilliard, with a great number of useful notes.

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*chartæ, de consuetudinibus et servitiis, &c.*

But a fine cannot be levied on an original in a personal action.

Mad. Diff. f.
15.

A fine may be levied of an advowson in a writ of right of advowson, of which *Madox* has given an instance of great antiquity.

Booth 247.

23. The writ on which fines are now usually levied, is a writ of covenant, which is in the realty, and lies where a man covenants to levy a fine to some other person of his lands and tenements. The form of the writ is thus:—*Præcipe A. quod teneat B. conventionem inter eos factam de manerio, &c. et nisi, &c.*

Reg. Brev.
165 a. Fitz.
N. B. 146.

24. There must be fifteen days between the *teste* and the return of this writ, and the *teste* must not be on a *Sunday*, or any day that is not *dies juridicus*.

2 Inst. 511.

25. In suing out a writ of covenant there is a fine due to the king called the *primer-fine*; for in every real action for lands and tenements, of the yearly value of five marks, there is a fine of six shillings and eight pence due upon the original in the Hanaper Office.

26. Where

26. Where the sheriff of the county in which the lands lie, is a party to the fine, the writ ought to be directed to the coroner: for although the sheriff is in general the proper officer to execute all writs, yet where the writ is brought against himself, it is the practice, in order to prevent partiality, to direct the writ to the coroner with this clause, *Quia prædictus A. B. est vicecomes comitatus D. fiat executio brevis prædict. per coronatorem, ita quod vicecomes non se intromittat.*

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Done v. Smethier & Leigh.
Cro. Car.
416. W. Jones
373.

27. If an original writ be countermanded by a *retraxit*, a fine cannot afterwards be levied on it. Thus in an assise, the plaintiff appeared and made a *retraxit*; afterwards the judges recorded an agreement between the parties in the nature of a fine: and by the better opinion it was void, *et coram non judice*, because when the agreement was made, there was no suit depending, the writ being determined by the *retraxit*.

Co. Read 10.

Bro. Ab. Tit.
Fine 82.

28. Formerly, if the king had died after the purchase of the original writ, the parties could not proceed to levy a fine on it, because it was abated. But now it is

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otherwise ; for by the stat. 1 *Ann c. 8. s. 5.* no original writ, process, or proceedings whatsoever, shall abate by the death of any king or queen.

A fine cannot be levied until the return of the writ of covenant.

29. As the parties are not supposed to appear before the return day of the writ of covenant, it follows that no agreement can take place between them until that period : and therefore if any of the parties die before the return day of the writ of covenant, the fine will be void.

Wright & M.
of Wickham.
Cro. Eliz.
468.

30. A writ of error was brought to reverse a fine levied by husband and wife, and the error assigned was that the writ of covenant upon which the fine was levied, bore *teste* the 10th of *August* 12 *Eliz.* and was returnable in *Michaelmas* term of the same year, which was the 27th *October*. The fine was acknowledged before commissioners, and the wife died the 17th of *October*, which was before the return of the writ of covenant. The fine was reversed.

The same point was determined in the cases of *Price v. Davis*, *Comb.* 57—71. *Clements v. Langbarne*, 2 *Lord Raym.* 872.

Watts

Watts v. Birkett, Barnes 220. Wilf. Rep.
p. 2. 115.

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31. The second part of a fine is the *licentia concordandi*, for as soon as the action is brought, the defendant knowing himself to be in the wrong, is supposed to make overtures of accommodation to the plaintiff, who accepts them, but having given pledges to prosecute his suit, applies to the court, upon the return of the writ of covenant, for leave to make the matter up, which is readily granted on payment of another fine.

Licentia Concordandi
2 Comm. 350.
5 Rep. 39. a.

32. This fine is called the king's silver, and is paid on obtaining the *licentia concordandi*, because the king by such composition loses the fines, amerciaments, and other advantages, that would have accrued to him upon the judgment or nonsuit, which in antient times formed no inconsiderable part of the royal revenue.

King's silver.
2 Inst. 511.

33. The king's silver, which is sometimes called the post-fine, with respect to the primer-fine, due on the original writ, is an antient revenue of the crown, and is as much as the primer-fine, and half as

Idem.

- Chap. II. much more. It is entered on the writ of covenant in the following manner:—
- 5 Rep. 89. a. *Robertus Drury dat Dominæ Reginæ sept. lib. pro licentia concordandi cum Thoma Tey arm. et Elconora Uxore ejus de placito conventionis de maneriis de, &c. &c. et habet chirographum per pacem admissum coram Jacobo Dier, &c.* And such entry ought to contain, 1st, The sum given for licence to compound. 2d, The party who pays it, that is, the person in whom the fee is to be vested. 3d, The plea, and between whom: and 4th, The lands for which the fine is paid.

34. If any of the parties die before the entry of the king's silver, the fine is in general void; because the king's silver not being due until the return of the writ of covenant, and being paid for permission to accommodate the suit, the agreement of the parties cannot be considered as lawful until it is entered; and consequently if the demandant or tenant dies before this is done, the fine will have no effect, being similar to a judgment given in an adversary suit, after the death of one of the litigating parties. If however it should appear upon record that the king's silver was paid before

fore the death of the cognizor, though in truth the fact be otherwise, the judges will support such a fine, and will not allow of any averment that the cognizor died before the entry of the king's silver, because that would contradict the record.

Vide infra.

35. A man and his wife acknowledged a fine before commissioners, the 26th of *March* 1621, and the wife died on the 27th of the same month. The 28th, composition was made in the alienation office upon a writ of covenant, made returnable in *Hilary* term before, and the king's silver was entered in the office of the king's silver as of the same *Hilary* term, and so the fine was passed and engrossed. The heir at law of the wife moved in the *Easter* term following against this fine, but upon debate the court resolved that the fine must stand.

Farmer's
Case Hob.
330.
Dyer 220. b.

36. A fine was acknowledged by a man and his wife on the 27th of *December* 1689, but by reason of king *James's* abdication, and his carrying away the great seal, there followed a stay of proceedings at law, and the woman died on the 22d of *February*. The king's silver was paid as upon a writ
of

Anonymous.
2 Vent. 47.

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of covenant in king *James's* time, though no writ was then sued out. Afterwards a writ of covenant was purchased, returnable in *Michaelmas* term preceding, sealed with the seal of king *William* and queen *Mary*, and the fine was engrossed as of *Michaelmas* term. It was moved that this fine should be vacated; but the court, after the cause had been twice argued, gave their opinion *seriatim* that the fine should stand, as the entering of the king's silver after the death of the parties could not then be examined into, the fine being engrossed and completed as a fine of *Michaelmas* term.

Ball v. Cock.
3 Mod. 140.

Harneis v.
Micklethwaite
Barnes 214.

37. A fine was stopped at the king's silver office by a caveat entered by order of a judge, upon an affidavit of the death of a married woman who was one of the cognizors, and an application was made to the court that the fine might pass notwithstanding such caveat.

It appeared that the married woman died the day after the caption of the fine, and after the *teste* but before the return of the writ of covenant. It was insisted that as the king's silver was not paid before the death of the wife, the fine ought not to pass.

pass. On the other side, it was contended, that fines were common assurances; that the acknowledgment made the fine complete; that the king's silver was the fine *pro licentia alienandi*, which was the pre-fine paid at the alienation office, and for which a receipt was indorsed on the writ of covenant, and that it was no part of the post-fine which was never collected until the fine was completed. The court, after consideration, were of that opinion, and ordered the fine to pass.

38. The doctrine laid down in this case, that the king's silver is the pre-fine, or fine paid *pro licentia alienandi*, is certainly wrong, and has been contradicted by the following determination.

A fine was acknowledged before commissioners on the 13th of May 1754. The writ of covenant was tested the first day of Easter term in five weeks (19th May). It was compounded, and the pre-fine paid between the 17th and 20th of May, and after passing the return, warrant of attorney, and *custos brevium* office, was brought to the king's silver office on the 11th of June, and the clerk then entered the king's silver

28 Geo. 1.
Barber v.
Nunn.
Barnes 218.

or

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or post fine in his book, and on the writ of covenant. *Mary Nunn* the cognizor died on the 27th of *May*. A caveat to prevent the compleating of this fine was brought to the king's silver office the 13th of *June*, before the record was made up in form, on behalf of *John Nunn*, eldest son and heir of the cognizor. A rule to shew cause why that caveat should not be withdrawn, was made absolute, and the court utterly exploded the notion which prevailed, undoubtedly by mistake, in the case of *Harneis v. Mickletwaite*, that the king's silver was the pre-fine, or fine for licence to alienate, whereas the king's silver is the post-fine, or fine given *pro licentia concordandi*. The return of the writ of covenant was agreed to have been in the life-time of *Mary Nunn*, the cognizor; and from that time the crown had a right to the post-fine, which was entered at the king's silver office before any caveat was entered against it. The making up the record in form is a ministerial act, not necessary to be done previous to the caveat, as the entry of the clerk of the king's silver was sufficient.

Cotton v.
Pyrell.
Barnes 215.

39. When a year and a day has elapsed from the date of the caption, or acknowledgment

ledgment of a fine, without entering the king's silver, an affidavit must be made that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the Alienation Office, if a year elapses before the fine is carried to the king's silver office, an affidavit must be made that the parties were alive when the king's silver was paid.

Gregory v.
Croucher.
Barnes 215.

40. By a rule of the Court of Common Pleas, made in *Easter* term 9 *Ann*, it is ordered, " That no fine whatsoever taken
" and acknowledged before the chief justice, or any judge of assise, or serjeant at law, if the date of the caption of such fine
" shall appear to have been razed, shall for
" the future pass the queen's silver office,
" and the queen's silver of such fine be
" recorded, by the said clerk of the queen's
" silver, before there be an order under the
" hand of the said chief justice, or some
" other justice of this court, for his passing
" and entering such fine first had and obtained."

41. Formerly the post-fine or king's silver was paid at the king's silver office,
but

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but by the statute 32 *Geo. 2. c. 14.* it is enacted, *f. 1.* “ That on every writ of covenant which shall be sued out for passing of fines in the Common Pleas at *Westminster*, the officer whose duty it is to set and indorse the pre-fine payable thereon, shall, at the same time, set the usual post-fine, and indorse the same on the back of the said writ, together with his name or mark of office, in like manner as the same are now indorsed at the king’s filver office; which post-fine shall be forthwith paid to the receiver of the pre-fines at the Alienation Office, with 4 *d.* as his fee for receiving the same, instead of his fee of 4 *d.* charged on lands and hereditaments, and payable to sheriffs, bailiffs and others, on discharging the same, by 3 *Geo. 1. c. 15.* which fee of 4 *d.* by the said act granted, after the first day of *Trinity* term 1759, shall cease; and such receiver shall indorse upon the back of every such writ of covenant one mark of office, as is now used by him on the receipt of pre-fines at the Alienation Office, with the name of such receiver, and the sum received as the post-fine, which mark of such receiver shall discharge the manors, lands and hereditaments comprised

“ prised in the said writ of covenant, and
“ the cognizees named therein.”

Sett. 2. “ The officer or clerk of the
“ king’s silver office, or his deputy, shall
“ continue to enter every fine upon record,
“ in the way hitherto used, and make the
“ same entries, and put thereon the same
“ indorsements, with the same mark, and
“ in like manner as hath hitherto been the
“ practice of the said office in passing fines;
“ and no fine, until the same be marked
“ with the sum to which the post-fine
“ amounts in the king’s silver office, shall
“ be effectual in law.”

Sett. 3. “ Where no pre-fine is payable
“ on any writ of covenant, *viz.* where the
“ lands are under the yearly value of five
“ marks, the officer at the Alienation Of-
“ fice, whose duty it is to set pre-fines,
“ shall set on every writ of covenant brought
“ to the said Alienation Office, on which
“ no pre-fine is payable, a post-fine of
“ 6 s. 8 d. and shall indorse such post-fine
“ of 6 s. 8 d. on every such writ of cove-
“ nant, with his name and mark of office,
“ as it has been usual; and every such post-
“ fine of 6 s. 8 d. shall be paid to the re-

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“ ceiver of the Alienation Office before the
 “ writ of covenant, on which no pre-fine is
 “ payable, be passed at the Alienation Of-
 “ fice ; and the receiver on payment of the
 “ said 6 s. 8 d. shall indorse and mark
 “ every such writ of covenant, as other
 “ writs of covenant are by this act directed
 “ to be indorsed.”

Señ. 4. “ The officer or clerk of the
 “ king’s silver office, or his deputy, after
 “ the first day of *Trinity* term 1759, shall
 “ not receive any writ of covenant, unless
 “ it appear by the mark and indorsement
 “ of such receiver, that the post-fine has
 “ been paid.”

Señ. 5. “ If after the payment of such
 “ post-fine, the writ of covenant, by the
 “ death of any of the parties, or other cause,
 “ be prevented from passing through the
 “ several other offices, so as the said fine is
 “ not completed, then the said receiver
 “ shall repay to the cognizees, or their at-
 “ torney, on producing and filing with him
 “ the said writ of covenant, every such sum
 “ as has been by him before received for
 “ the post-fine ; and such writ of covenant
 “ so

“ so remaining filed with such receiver,
“ shall be a discharge to such receiver.”

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42. The third part of a fine is the concord, or agreement entered into openly in the Court of Common Pleas, or before the Chief Justice of that Court, or commissioners duly authorised for that purpose, which is the foundation and substance of the fine. It is usually an acknowledgment from the *deforciant*s, or those who keep the others out of possession, that the lands in question are the right of the demandant; and from the acknowledgment or recognition of right thus made, the party who levies the fine is called the cognizor, and the person to whom it is levied the cognizee.

Concord.

2 Comm. 350.

5 Rep. 39. a.

Vide ch. 4.

The form of the concord is thus : “ And
“ the agreement is such, to wit, that the
“ aforesaid *A.* (the *deforciant* in the origi-
“ nal writ) hath acknowledged the afore-
“ said manors, lands, tenements and here-
“ ditaments, with the appurtenances, to be
“ the right of him the said *B.* (the plaintiff
“ or demandant) and those he hath remised
“ and quit-claimed from him the said *A.*
“ and his heirs, to the aforesaid *B.* and his

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“ heirs for ever. And moreover the said
 “ *A.* hath granted for himself and his heirs,
 “ that he will warrant to the aforesaid *B.*
 “ and his heirs the aforesaid manor, lands,
 “ tenements and hereditaments, with the
 “ appurtenances, against him the said *A.*
 “ and his heirs for ever.”

Bract. 389. a.
 Idem 392. a.

43. By the common law, the cognizor seems to have been bound to warrant the lands to the cognizee, although no express words to that purpose were inserted in the fine. *Item sufficit finis factus in curia Domini Regis, licet expressa warrantia vel homagium et servitium non intervenerit, dum tamen constiterit per finem & chirographum, quod ille qui tenet, tenere debeat de eo qui vocatur ad warrantum.* But in course of time it became the practice to annex an express warranty to all fines, which is still continued.

Farmer's
 case, Hob.
 350.

44. It has long been the practice for the cognizor to make the cognizance (that is) to acknowledge the concord of the fine, before any original writ has been sued out, and this custom has so far prevailed, that the judges have uniformly supported such fines; but in all cases of this kind, an original

ginal writ must be sued out and made returnable on some day previous to that on which the concord is acknowledged; a *licentia concordandi* must also be obtained, and the king's silver must be regularly paid and entered; for these circumstances are still absolutely necessary to complete the fine.

45. The practice of acknowledging the concord of a fine before the writ of covenant was sued out, was often productive of great inconveniencies and irregularities, which are now prevented by a rule of the Court of Common Pleas, made in *Trinity* term 30 *Geo.* 3. by which it is ordered that from and after the first day of *Michaelmas* term then next ensuing, every fine at the time of signing the judge's *allocatur* thereon shall have the writ of covenant sued out and annexed thereto.

46. By the statute 23 *Eliz.* c. 3. s. 5. it is enacted, " That every person that shall
" take the knowledge of any fine, or shall
" certify them, shall, with the certificate of
" the concord, certify also the day and
" year wherein the same was knowledged.
" And that no clerk or officer shall receive

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“ any writ of covenant, whereupon any
 “ fine is to pass, unless the day of the
 “ knowledge of the same fine shall appear
 “ in, or by such certificate, upon pain that
 “ every clerk that shall receive any such
 “ writ shall forfeit for every time that he
 “ shall so offend the sum of five pounds.”

*Rules respect-
 ing the concord.*

47. The concord of the fine comes in lieu of the sentence which would have been given in case the parties had not compounded the cause; and is therefore exactly of a similar nature, and attended with the same consequences as a judgment in an adversary suit.

Co. Read. 6. The cognizance must therefore be made of those things only, and to those persons only who are named in the original writ on which the fine is levied, because the cognizance being in the nature of a judgment binds only those persons and things which are judicially before the court.

Co. Read. 6. 48. This rule however admits of a few exceptions, for a remainder may be limited in the concord of a fine, to a person not named in the original writ, in the same manner as a remainder may be limited in
 a deed

a deed to a person who is not a party to it.

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49. If a *præcipe* be brought against a tenant for life, and upon his default the person in reversion is received, he may levy a fine of his reversion to the demandant, although he is not named in the original writ. Co. Read. 11.

In the same manner if a fine is levied by a vouchee to the demandant, or by a demandant to the vouchee, it will be good; but a fine levied by a vouchee to a stranger is void. 3 Rep. 29. b.

The reason of the two last cases is, because the person in reversion and the vouchee are allowed by the court to come in the place of the tenant against whom the *præcipe* was originally brought, and having thus been made parties to the suit, they are bound by the judgment, as much as if they had been named in the original writ.

50. The object of fines being to settle the possession, not only for the present but for ever, in the most certain and secure manner, the judges never allow lands to be

Bro. Ab. tit.
Fine 7.
5 Rep. 38. b.
Co. Read. 8.

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limited in the concord of a fine to two persons and their heirs, but always direct the lands to be limited to the two persons, and to the heirs of one of them.

Robinson's
Gavelk. 132.

51. The necessity of the case however requires that where the lands comprehended in the fine are held by gavelkind tenure, this rule should be dispensed with; and therefore when a fine is levied of lands held in gavelkind, the judges will permit them to be limited to two or more persons and their heirs.

Co. Read. 3.
Rob Gav.
132.
Bro Ab. tit.
Fine 65.

52. A warranty ought not to be allowed in the concord of a fine from two persons and their heirs for the same reason; but a warranty has been allowed from three persons and their heirs where the estate was held in gavelkind.

2 Rep. 74. b.
5 Rep. 38. b.

53. The judges ought not to permit a fine to be levied upon condition, nor should a saving or exception, or a clause of re-entry be allowed in a fine. But let it be observed that if a fine is actually levied to two persons and their heirs, or with a warranty from two persons and their heirs, or upon condition, with a saving, exception,

4 Reeves 336.

or

or clause of re-entry, such a fine will notwithstanding be valid, upon the principle that *fieri non debuit sed factum valet, et facta tenent multa quæ fieri prohibentur*. And *Plowden* has given some instances of fines levied on condition, which were allowed to be good.

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12 Rep. 125.
Plowd. 34.

54. Lands situated in different counties may be contained in the same concord, but there must be several writs of covenant.

2 Inst. 512.
Dyer 227.

55. Formerly lands purchased of different persons were allowed to be comprised in the same concord, and every vendor warranted against himself and his heirs only. But by an order of the Lord Chancellor *Hatton*, reciting, that by these kinds of fines her majesty was defrauded of the profit of her post-fines, and of the seals on writs, and the Chancellor and other officers lost their fees, the curfitors are authorised to stay a writ where there is more than one demandant, and one deforciant, except coparceners, joint-tenants, and tenants in common. But the curfitors will permit two separate purchases to be comprised in one fine, on an affidavit that the value of

Wilson 47.

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both together does not exceed two hundred pounds.

56. The *concordia facta in curia* is the complete fine, and therefore if after the concord is acknowledged in court, one of the cognizors dies, still the cognizee may proceed with his fine against the surviving cognizor.

Ersfield's
Case, Hob.
529.

57. Where two brothers acknowledged the concord of a fine before Lord Chief Justice *Hobart*, and then the elder brother died, several motions were made for the proceeding and staying of the fine; but the Chief Justice was clearly of opinion, that the cognizee might proceed with his fine as against the surviving brother, and take out his writ of covenant accordingly; the death of the elder brother being no impediment, for the acknowledgment of each person was good against himself, and should operate for as much as he could pass.

Cotton v.
Baylie,
Barnes 215.

58. A fine was stopped at the king's silver office for want of an affidavit that the parties were living, a year having elapsed since the acknowledgment; and one of the
cog-

cognizors being dead, application was made to the judges that he might be struck out, and that the fine might pass as to the other cognizor. This motion was denied, but a rule was made that the surviving cognizor should shew cause why the fine should not pass generally as to all the parties; and upon affidavit of service, the rule was made absolute.

59. The fourth part of a fine is the note, which is an abstract of the writ of covenant, and the concord; and is only a docket taken by the chirographer, from which he forms the chirograph. It is sometimes taken in the old books for the concord. Notes
5 Rep. 39. a.

60. The fifth and last part of a fine is the foot, chirograph, or indenture, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made or ingrossed at the chirographer's office, and delivered to the cognizor and cognizee, beginning with these words—*Hæc est finalis concordia*, and then reciting the whole proceeding Foot or Chiro-
graph.

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ceeding at length; thus the fine is completely levied at common law.

Co. Read. 1.

61. A fine is said to be ingrossed when the chirographer makes out the indentures, and delivers them to the parties. But it is not absolutely necessary that a fine should be ingrossed, provided it be recorded; for Sir *Edward Coke* observes, that a fine is a perfect record before it is ingrossed.

62. A fine may be ingrossed at any time after it is levied.

Sir J. Brome's
Case,
4 Leon. 96.
Dyer 254. a.

Sir *John Brome*, in 33 *Hen.* 8. acknowledged a fine of certain lands. The king's silver was entered, and the cognizance taken; and in 29 *Eliz.* the person who claimed under this fine came into court, and prayed that the fine might be engrossed, it appearing upon examination, that the party to whom the fine was levied was seized after the fine, and suffered a common recovery of the land, which had been enjoyed according to the said fine ever since. The court ordered the fine to be ingrossed.

63. The

63. The record of the fine which remains in the possession of the chirographer is the *principale recordum*; so that if there is any difference between it and the record which remains with the *custos brevium*, that which continues with the chirographer is considered as the true record.

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3 Leon. 183.
Case 234.
Godb. 103.

64. The chirograph of a fine is evidence to all persons, and in all courts, of such fine; because the chirographer being an officer appointed by the law for the purpose of transcribing fines from the record, his copies must be allowed to be authentic.

Gilb. Evid.
24. Buller N.
P. 229.

65. There are two petitions of the Commons in the rolls of Parliament, 4 Hen. 4. no. 35. & 5 Hen. 4. no. 28. stating, that many fines of land remaining in the king's treasury, and the notes of such fines remaining in the Court of Common Pleas, had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many persons were disinherited; in consequence of which, a statute was immediately passed, 5 Hen. 4. c. 14. enacting, that all the proceedings on fines, both previous to, and at the acknowledgment

All the Proceedings on Fines must be recorded.
Rot. Parl. vol.
3. 495. 543.
557, 558.

ment thereof, should be inrolled of record in the Court of Common Pleas. And by the 23 *Eliz. c. 3. s. 1. & 6.* it is enacted that every writ of covenant and other writ, whereupon any fine shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowledging of any of the same fines, the return thereof, the concord, note and foot of every such fine, the proclamations made thereupon, and the king's silver, may upon the request or election of any person, be inrolled in rolls of parchment; and that the inrolments of the same, or of any part thereof, shall be of as good force and validity in law, to all intents, respects, and purposes, for so much of any of them so inrolled, as the same being extant and remaining, were or ought by law to be.

66. The office of the chirographer of fines was burnt down in the year 1679, whereby several records of fines which had been levied in *Trinity* and *Michaelmas* term preceding, were either burnt or lost. In consequence of which an act was passed, 31 *Car. 2. c. 3.* reciting, that the fines so burnt or lost had duly passed all the offices; so that by the records of the king's silver, the

the notes of the cursitor who made out the writs of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy; &c. the full contents of all such fines would appear. But for want of the records of the fines so burnt or lost, purchasers and others, whose titles were secured under the said fines, were in danger of having the same impeached. It was therefore enacted, that the said chirographer or his deputy should, before the end of the next *Trinity* term, upon oath certify to the Justices of the Common Pleas, a note of all such fines entered into the said book kept by the said deputy, that he, upon diligent search should find, were either burnt or lost, by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof set up in *Westminster-Hall*, &c. and that any time within three years the Chief Justice of the said Court of Common Pleas, together with any one or more of the Justices of the said Court, should have power to send for any officer's books, records, &c. and upon full examination of any such fine, the records whereof were burnt or lost, should direct the said chirographer or his deputy

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deputy to new-ingross the note and foot of such fine without fee, and to carry the same before the said Chief Justice, and such other of the said justices as shall have taken the examination concerning the burning or loss of such fine, who were required to subscribe their names at the bottom of the said note and foot; and every such fine whereof the record should be so new-engrossed, should be of the same force and effect, as if it had still remained upon record unconsumed or not lost.

*No averment
can be made
against the
chirograph of
a Fine.*

2 Inst. 260.

a.

Dyer 89. b.

67. It is a principle of the common law, that the evidence of a record is of so high and certain a nature, that its authenticity is never permitted to be called in question; so that no averment can be made against any fact which is once upon record; and therefore when the foot, or *chirographum* of a fine is recorded, no averment can be made as to the caption or time of it's acknowledgment, but it must be considered as a fine of that term in which it is recorded.

Lloyd v.
Vile. Say and
Sele,

1 Brown 379.
Salk. 341.

10 Mod. 40.

68. Upon a trial at bar in ejectment it appeared that *Nathaniel* Lord Viscount *Say* and *Sele* being tenant in tail of the premises

premisses in question, with remainder over, levied a fine in *October* 1701, and, in *Michaelmas* term following, suffered a recovery: and to prove this the *chirograph* of a fine was produced, importing, that *Nathaniel* Viscount *Say* and *Sele* levied that fine on the 23d of *October* 1701, and the exemplification of a common recovery was also produced which appeared to have been suffered on the 18th of *November* 1701. The question was, Whether the cognizee of the fine had the freehold in him when the recovery was suffered?

It was insisted by the plaintiff's counsel that he had not; for that the fine given in evidence to make him so, was not in fact acknowledged, until the 2d of *March* 1701, which was four months after the recovery was suffered: and, to support this fact, they offered to produce and prove, 1st, The record of the recognizance, or acknowledgment of the fine, under the hand of the Lord Chief Justice *Trevor*, whereby it appeared that the acknowledgment thereof was made and taken before the said Lord Chief Justice on the 2d day of *March* 1701, and not before. 2dly, That the acknowledgment
of

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of the fine was the very true acknowledgment or recognizance of the concord upon which the fine given in evidence passed, and upon which the *chirograph* of that fine was made and engrossed. And 3dly, They offered to produce the files of the Court of Common Pleas of the acknowledgments of all fines in *Michaelmas* term 1701, whereby it would appear that Lord *Say* and *Sele* did not acknowledge any fine whatsoever, of or in that term at any time before the suffering the common recovery. But the Court of Queen's Bench refused to admit any of the matters offered against the fine, to be given in evidence, being of opinion that no proof or evidence of the time of the acknowledgment of a fine ought to be admitted, contrary to, or against the *chirograph* thereof; and that the record, which is the *chirograph* of the fine, cannot be falsified until it is vacated or reversed.

From this judgment a writ of error was brought in the House of Lords; and one of the errors assigned was, because the records and matters offered to be given in evidence, were not admitted or allowed
by



by the Court to be given in evidence to prove the true time of acknowledging the fine: in support of which it was insisted, that as the fine was not in fact acknowledged until the 2d of *March*, it could not transfer the freehold of the lands to the tenant to the *præcipe* three months before the time of that acknowledgment; and that the plaintiff was admitted to the proof of this fact, by the statute 23 *Eliz.* Ante f. 46.
c. 3. s. 5. which directs that the time of the acknowledgment shall be certified by those who take such acknowledgment; for if a man cannot give in evidence the time of acknowledging a fine, in order to avoid deceit imposed upon him by that fine, this statute would answer no purpose.

On the other side it was contended, that the caption of the fine ought not to be admitted against the record or indenture of the fine; for it would shake all family settlements, and introduce the greatest uncertainty and confusion in all conveyances by fines, upon which the most considerable estates in the kingdom depended; and that an attempt to set aside a fine

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Wide infra.

upon evidence was never before made. That, in the indentures of all fines, the concord is recorded to be made in Court; whereas the captions of the acknowledgments of all fines (except a very few) are taken out of Court, either before the Lord Chief Justice of the Common Pleas, or Commissioners in the country; and upon a writ of error, no error can be assigned in the caption varying from the record, as that would be an error contrary to the record: but if in the present case the fine was irregular, the proper method was to apply to the Court of Common Pleas where the same was levied, and not attempt in a summary way to invalidate it by evidence in ejectment. The judgment was affirmed.

Of motions to prevent fines from being completed.

69. Applications are sometimes made to the Court of Common Pleas to prevent fines from being completed, on a suggestion that the parties are disabled by law from levying such fines.

Wilson 96.

By a rule of Court made *Hil.* 28 and 29 *Car.* 2. all persons making any complaint against fines acknowledged by infante,

fants, feme-coverts without the consent of their husbands, or persons of *non sane memorie*, or otherwise disabled by law, to acknowledge the same, or by any person in the name of another, or by the like deceit, and obtaining rules for the staying of such fines, shall from term to term, so long as they shall expect benefit or observance of such rules, enter and continue the same rule for that term, or leave copies thereof with the Custos Brevium, Clerk of the King's Silver, and Chirographer, that the same may thereby be the better taken notice of; or, in default thereof, the said officers, or any of them, shall not stand farther obliged thereby.

And all persons concerned in the obtaining or prosecuting such rules for the staying of such fines so levied as aforesaid, their attornies or clerks, are thereby enjoined every term to search and see the books and entries of fines with the clerk of the king's silver, or other officer, where entries are kept for that purpose.

70. By a rule of Court made *Passb.*
29 Car. 2. all manner of *caveats* and or-

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ders for the stopping any fines shall be renewed every term, and copies thereof left with the Clerk of the King's Silver, for which he is to demand only his antient fee of 3*s.* 4*d.* the term; and in default thereof all *caveats* that shall not be so renewed, shall lose their force and be void.

Of the Proclamations.

71. When fines became a general mode of assurance, it became necessary to render the levying of them a matter of the most public notoriety, on account of those whose rights might be barred by not making their claim in due time. For this purpose it was enacted by the 27 *Ed.* 1. c. 1. that the notes of all fines should in future be openly read in the Court of Common Pleas at two certain days in one week, and that during such reading all pleas should cease.

72. By the statute 4 *Hen.* 7. c. 24. *f.* 1. it is enacted, "That after engrossing of
 "every fine, it shall be read and pro-
 "claimed in open court the same term,
 "and in three terms then next following
 "the same ingrossing, in the same court,
 "at four several days in each term, and
 "in

“ in the same time that it is so read, all
“ pleas to cease.”

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Since the making of this act, the proclamations are indorsed on the foot of the fine, and are considered as matters of record.

73. By the words of the statute 4 *Hen.* Plowd. 371.
7. if one of the three terms immediately subsequent to that in which a fine was levied, was adjourned, the proclamations would have been ineffectual, and this defect could not have been supplied in the next term; to remedy which, a statute was passed 1 *Mary c. 7. s. 2.* enacting
“ That all fines, whereupon the procla-
“ mations should not, by reason of the
“ adjournment of any term by writ, be
“ duly made should be of as good force,
“ effect and strength, to all intents and
“ purposes, as if the term had not been
“ adjourned.”

It has been determined by all the judges that even an adjournment of part of a term was provided for by this act, because it was a favourable law, and to be construed by equity.

Dyer 186. 2.
2 Inst. 519.

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74. By the 31 *Eliz. c. 2.* it is enacted, That all fines shall be proclaimed only four times, that is to say, once in the term wherein they are ingrossed, and once in every of the three terms holden next after the same ingrossing; and that every fine proclaimed as aforesaid, shall be of as great force and effect in law to all intents and purposes, as if the same had been sixteen times proclaimed.

3 Rep. 86. b.
Wakefield v.
Hodgson.
Cro. Eliz.
692.

75. Since the statute 4 *Hen. 7.* fines have been distinguished into fines at common law, and fines with proclamations: it is in the election of every person who levies a fine to have it proclaimed in the usual manner, or not. And if the cognizee dies before the proclamations are made, his heirs may cause the fine to be proclaimed.

Fish v.
Brocket.
Plowd. 265.
Dyer 181. b.

76. The statute directs that the proclamations should be made not only during term, but also in Court at the time when the Judges are sitting: so that if the proclamations happen to be made either before the beginning or after the end of term, or on a *Sunday* or other festival day on which the Court does not sit, being *dies non juridicus*, the proclamations will be all void.

And

And although the proclamations should be made on days which were *dies juridici*; yet if the contrary appears on record, the proclamations are void, as no averment can be admitted against the record.

77. An error in the proclamations would not however destroy the validity of the fine, for it would still enure as a fine at common law; because the fine taken separately is one perfect matter of record, before the proclamations are made, which binds the parties and the right of the land, and the proclamations are distinct and different from the fine, they and the fine being several matters of record, for which reason error in the one is not error in the other. But if the fine is erroneous, the proclamations are then void, because the fine is the principal, and *sublato subiecto tollitur ejus accidens*.

Dyer 216. a.
1 Bulst. 206.

78. If the proclamations on a fine be certified in a *certiorari* by the *custos brevi-um*, and it appears by the certificate that two of the proclamations were made in one day, a new *certiorari* may be directed to the chirographer, and if he certifies that the proclamations were well and duly

Ragg and
Bowley's
Case, 3 Leo.
106.

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made, the Court will direct the proclamations in the office of the *custos brevium* to be amended according to the proclamations in the chirographer's office, because the chirographer makes the proclamations, and is the principal officer as to them; and the *custos brevium* has only an abstract of them.

Gilb. Evid.
25. Buller N.
P. 229.

79. When a fine with proclamations is given in evidence, the proclamations must be examined by the roll, because the chirographer is not appointed by the statute to copy the proclamations, as he is to copy the concord.

80. By the 23 *Eliz. c. 3. s. 6.* it is enacted that the chirographer shall every term, write out a table of the fines levied in each county in that term, and shall affix it in some open part of the Court of Common Pleas all the next term; and shall also deliver the contents of each table to the Sheriff of each county, who shall at the next assizes fix the same in some open part of the court.

*It is Felony for
one Person to
acknowledge a
Fine in the
name of another*

81. It was formerly a practice for one person to acknowledge a fine in the name of

of another, and in such cases the Court of Star Chamber, within whose jurisdiction frauds of this kind were considered, could only punish the offender by imprisonment. But by the statute 21 Jac. I. c. 26. it is enacted, that all and every person and persons who shall acknowledge any fine in the name of any other person, not privy or consenting to the same, and shall be lawfully convicted thereof, shall suffer death without benefit of clergy.

82. With respect to the time when a fine is completed, Sir *Edward Coke* in his comment on the statute *de modo levandi fines* says, “ A fine is said to be levied
“ when the writ of covenant is returned,
“ and the concord and the king’s silver duly entered ; this maketh the land to pass,
“ and from this shall the year and day be
“ accounted, albeit the fine be engrossed
“ afterwards.”

*At what time
a Fine is completed.
2 Inst. 517.*

The modern method of levying a fine by first acknowledging the concord, then suing out an original writ, and paying the king’s silver, has given rise to a different mode of expressing the rule laid down by Sir *Edward Coke* ; for a fine is now said to

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be completed upon the entry of the king's silver, (provided it was previously acknowledged); and if any of the cognizors die before the remaining parts of the fine are perfected, still the fine will be valid.

83. This principle has so far prevailed, that the Court will not prevent a fine from being completed after the king's silver is paid, if the parties are alive.

Petty's case.
1 Freem. 78.

A motion was made to stay the passing of a fine, which was acknowledged by an infant of thirteen years old, the Court said as the king's silver was paid, it was gone too far. But they assigned the infant a guardian, who had instructions to bring a writ of error to reverse it.

Ante f. 45.

84. In consequence of the rule of Court already stated, by which it is directed that the writ of covenant shall in future be sued out before the concord is acknowledged, it may now be laid down that a fine is completed when the concord is duly acknowledged.

*When a Fine
begins to operate.*

85. Although it must be very material in many instances to fix the precise time when

when a fine begins to operate, yet it is a subject respecting which very little is to be found in the writers on law. But if we reason by analogy from the nature and effects of other judgments, we shall be able to ascertain this point.

The time when a fine is acknowledged is perfectly immaterial in this respect, for we have already seen an instance, where it was determined, that a fine began to operate in *Michaelmas* term, although it was not acknowledged until four months after. Ante f. 68.

86. The term in law, is considered to many purposes as but one day, and if a judgment be given at any time during the term, it relates to the first day of that term, and is considered in law as having been given on that day; and the first day of term is the *essoïn* day, for the *quarto die post* is only a day of grace. However if a writ is returnable on the second or any other return day of the term, the judgment will then relate to that return day, for until the return of the writ, the judgment cannot possibly be given. Cro.Car. 102.

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§7. A fine being considered as a judgment, must, like all other judgments, relate to the first day of term in which it is recorded, if the writ of covenant whereon it is levied be returnable the first day of term, otherwise it must relate to the return day of the writ of covenant; for, in levying a fine, there is no continuance of process to retard the relation, as the *licentia concordandi* is supposed to be obtained on the return of the writ of covenant, and the concord immediately acknowledged.

§8. In support of this proposition I shall transcribe a case reported by *Jenkins*, of which I presume the authority will not be disputed, although the reporter has not mentioned when or by what Court it was determined.

Jenk. 250.

“ *A.* covenants with *B.* to levy a fine
 “ *Oct. Michaelis* 1 *Car.* *A.* acknowledges
 “ a statute to *C.* 8th *October* same year.
 “ The fine is levied according to the cove-
 “ nant, and the consance taken the 12th
 “ *October* aforesaid. This conseree shall
 “ avoid said statute by relation to the day
 “ of the effoin, which was before the said
 “ 8th day of *October*.”

§9. In

89. In a note of Mr. *Peere Williams*, it is said, that if *A.* devises land and levies a fine, and the caption and deed of uses are before the will, but the writ of covenant is returnable after the will, this seems a revocation; because a fine operates as such from the return of the writ of covenant, and not from the caption; and yet (says the reporter) this is a hard case, since by the caption the party conusor does all his part, and the rest is only the act of the clerk or his attorney, without any particular instructions from the party.

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Vol. 3. p. 170.

These passages, and the conclusions drawn from the rules by which all other judgments are construed, seem fully to prove, that a fine whether it be acknowledged before or after the original writ on which it is levied is sued out, will begin to operate from the return day of such original writ.

1 Burr. 711.

CHAPTER III.

Of the several Sorts of Fines.

*Fines executed
and executory.*

90. **W**HENEVER a judgment is obtained, whether in an adversary or an amicable suit, the next step is to procure the execution of it, by obtaining the actual possession of the thing recovered: and for this purpose the law has provided, that in all real actions, the person who recovers, shall have a writ of *habere facias seisinam*, directed to the sheriff of the county in which the lands are situated, commanding him to deliver the possession according to the judgment.

Ante f. 4.

Fines having at all times been considered as judgments in adversary suits, a writ of *habere facias seisinam* always issued to put the party in possession who acquired the lands by a fine. When fines became common assurances, the purchaser in order to avoid the trouble and expence of suing out a writ of possession, had in some instances livery of seisin given him in the country, and for his further assurance, obliged to vendor

2 Bac. Ab.
524.

vendor to covenant that he would levy a fine to him; but as the purchaser was already in possession, no writ of *habere facias seisinam* was deemed necessary.

91. This practice gave rise to the distinction between fines executed and fines executory. A fine executed immediately transferred the possession from the cognizor to the cognizee, who might therefore enter on the lands which had been conveyed to him by the fine, as soon as it was levied.

Co. Read. 2.

A fine executory did not of its own force give immediate possession in law to the cognizee, as he could not immediately enter on the lands: but it was necessary that he should sue out a writ of *habere facias seisinam*, in order to gain possession of that which he had acquired by the fine.

92. The cognizee of a fine could not distrain before entry, because an avowry came in lieu of an action, to which privity was requisite; for the same reason he could not have an action of waste, a writ of entry *ad communem legem in consimili casu*, or in *casu proviso*. But the cognizee might take those things which the lord might seize or

1 Inst. 320. a.
Shep. Tou.
253.

Gillb. Ten.
102.

enter

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enter upon, without bringing any action, as a heriot, lands fallen by escheat, or might enter for an alienation of a tenant for life.

2 Inst. 469.

2 Reeves 189.

93. Where the cognizee of a fine executory had suffered a year and a day to elapse from the time when the fine was levied, without suing out a writ of *habere facias seisinam*, he must then have sued out a writ of *scire facias*, which might also be sued out by the heir of the cognizee.

94. By this writ the sheriff was commanded to warn the terre-tenants to appear and shew cause, if they could, why the cognizee of the fine, or his heirs, should not have execution of the fine. And if at the return of the *scire facias* the terre-tenants did not shew some cause to the contrary, the plaintiff or cognizee became intitled of course to a writ of *habere facias seisinam*.

Shep. Tou. 4.

95. If the party to whom the estate was limited by a fine executory was in possession at the time when such a fine was levied, he need not have sued out a writ of *habere facias seisinam*; for in that case the fine would enure by way of extinguishment.

96. If

96. If a fine executory was levied of a reversion depending on an estate for life, or years, or of a seignory, or any thing which lay in grant, they would pass immediately, because it would be impossible to give actual possession of them.

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1 Rep. 97. a.

97. Since the statute of uses 27 Hen. 8. writs of possession are never sued out where fines are levied to uses, for the statute executing the possession to the use, the cognizee is immediately in possession without attornment; and by the 4th and 5th Ann c. 16. attornment after a fine is become unnecessary, so that writs of possession are now totally disused.

Booth 250.

Pigot 49.

6 Rep. 68. a.

Fines are again divided into four sorts, 2 Comm. 352.
1st, *Fines sur cognizance de droit come ceo, &c.*
2d, *Fines sur cognizance de droit tantum.*
3d, *Fines sur concessit.* 4th, *Fines sur done grant & render.*

98. A fine *sur cognizance de droit come ceo qu'il a de son done* is the best and surest kind of fine; for the deforciant, in order to keep his supposed covenant with the plaintiff, of conveying him the lands in question, and at the same time to avoid the formal-

Fines sur cognizance de droit come ceo, &c.

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ty of an actual feoffment, with livery of seisin, acknowledges in Court a former feoffment or gift in possession, to have been made by him to the plaintiff; so that it is rather an acknowledgment of a former conveyance than a conveyance originally made; for the deforciant acknowledges, *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he had *de sone done*, of the proper gift of himself, the cognizor.

1 Infl. 50. b.

1 Salk. 339.

3 Atk. 141.

2 Comm. 384

99. This species of fine has been called a feoffment of record; but this expression is by no means accurate; for there are cases in which a feoffment has a more extensive operation than a fine; and therefore Sir *William Blackstone* has justly observed, that it might, with more accuracy be called an acknowledgment of a feoffment on record.

100. The form of this fine is: “ And
 “ the agreement is such, to wit, that the
 “ aforesaid *A.* hath acknowledged the
 “ aforesaid manor, &c. to be the right of
 “ him the said *C.* as that which the said
 “ *C.* hath of the gift of the aforesaid *A.*
 “ and that he hath remised and quit-claimed
 “ from

"from him the said *A.* and his heirs
 "to the aforesaid *C.* and his heirs for
 "ever."

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101. This species of fine is executed, and therefore gives the cognizee immediate possession of the land. Co. Read. 2.

102. It also passes an estate in fee-simple without the word *heirs*; for when the cognizor acknowledges the lands to be the right of the cognizee, it would be repugnant and contradictory to his own acknowledgment to claim any estate in the lands in remainder or reversion. Besides in every judgment a fee-simple was recovered, and the cognizance or acknowledgment of the concord coming in the place of a judgment, must have the same effect. 1 Inst. 9. b.

103. But if the concord is qualified by the express words of the parties, as if the lands are limited to the cognizee for life, or to the cognizee and the heirs of his body, the fine will then only pass an estate for life, or an estate in tail; for it would be absurd that a greater estate should pass than that which the parties themselves 1 Salk. 340.

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have limited; and the preceding donation or feoffment which is acknowledged in the fine may as well be supposed to have been for life, or in tail, as in fee.

Bro. Ab. tit.
Fine pl. 30.

104. A rent cannot be reserved on a fine *sur cognizance de droit come ceo*, or on any other fine which is executed; because as the cognizance supposes a preceding gift, the cognizor cannot reserve to himself any thing out of lands, whereof he has already conveyed away the absolute property; so that the *reddendum* comes too late, when a precedent absolute gift without any such reservation is before acknowledged.

Roll. Ab.
tit. Fine (O)
n. 10.

105. But if an estate for life only be conveyed by the fine, the cognizor may then reserve a rent with a clause of distress; because not having acknowledged the entire and absolute property to be in the cognizee, it is not repugnant to reserve a rent out of it.

*Fines sur
cognizance
de droit tan-
tum.*
2 Comm.
353.

106. A fine *sur cognizance de droit tantum*, or upon acknowledgment of the right only, without the circumstance of a preceding gift by the cognizor. This species
of

of fine is generally used to pass a reversionary interest, which is in the cognizor; for of such reversions there can be no feoffment or donation with livery supposed, as the freehold and possession during the particular estate is vested in a third person.

This fine may also be used by a tenant for life, in order to make a surrender of his life estate to the person in remainder or reversion; and it is then called a fine upon surrender. Co. Read. 3.

107. The form of it is: "And the agreement is such, to wit, that the aforefaid *A.* hath acknowledged the aforefaid tenements, &c. to be the right of the said *B.* and he hath granted for himself and his heirs, that the aforefaid tenements which *W. R.* and *M.* his wife hold for the term of the life of the said *G.* of the inheritance of the said *A.* on the day on which this agreement was made, and which after the decease of him the said *G.* ought to revert to the said *A.* and his heirs, shall after the decease of the said *G.* entirely remain to the said *B.* and his heirs for ever."

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1 Inft. 9. b.

2 Bac. Ab.

524.

108. This fine is executory, and paffes a fee-fimple without the word *heirs*. It seems to have been the moft ancient fpecies of fine; for the demandant was obliged to follow the rules of law, and fue out a writ of poffeffion: but when it became ufual to procure a feoffment of the lands firft, a writ of poffeffion was unnecessary, which probably gave rife to fines *fur cognizance de droit come ceo*.

Co. Read. 3.

109. If there be a tenant for life, remainder for life, and the firft tenant for life levies a fine to the perfon in remainder, *fur cognizance de droit tantum*, it will operate merely as a furrender of his eftate for life; becaufe, by this fine the tenant for life only acknowledges all the right which he had in the lands to belong to the perfon in remainder. But if in this cafe the tenant for life had levied a fine *fur cognizance de droit come ceo, &c.* it would create a forfeiture of both their eftates, and the perfon in reversion might enter immediately; becaufe a fine *fur cognizance de droit come ceo, &c.* is always fupposed to pafs an eftate in fee-fimple, unlefs the contrary is exprefsly mentioned; whereas a fine *fur cognizance de droit tantum* only
conveys

Vide infra.

conveys all the right which the cognizor has, and no more.

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110. A fine *sur concessit* is where the cognizor, in order to make an end of disputes, tho' he acknowledges no precedent right or gift, grants to the cognizee an estate *de novo*, by way of supposed composition, which may be either an estate in fee, in tail, for life, or even for years.

Fine sur concessit.
2 Comm.
353.

The form of this fine is: "And the agreement is such, to wit, that the aforefaid *A.* hath granted to the aforefaid *B.* the aforefaid tenements, &c. to hold for 61 years." It is executory.

111. A fine *sur done grant & render* is a double fine, comprehending the fine *sur cognizance de droit come ceo*, and the fine *sur concessit*. It is used in order to create particular limitations of estates; whereas the fine *sur cognizance de droit come ceo* conveys nothing but an absolute estate, either of inheritance, or at least of freehold.

Fine sur done Grant & Render.
2 Comm.
353.

In this fine the cognizee, after the right is acknowledged to be in him, renders

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or grants back to the cognizor some other estate in the lands.

112. The form of this fine is: " And
 " the agreement is such, to wit, that the
 " aforesaid *A.* hath acknowledged the
 " aforesaid tenements to be the right of
 " him the said *B.* as those which the said
 " *B.* hath of the gift of the aforesaid *A.*
 " and those he hath remised and quit-
 " claimed from himself the said *A.* and
 " his heirs for ever, (warranty from the
 " cognizor): and for this acknowledg-
 " ment, remise, quit-claim, warranty,
 " fine, and agreement, the said *B.* hath
 " granted to the said *A.* the aforesaid te-
 " nements, &c. and this he hath rendered
 " to him, in the same court to hold the
 " said tenements, &c. to the said *A.* and
 " the heirs of his body."

Co Read.

11.

2 Roll. Abr.

15, 16.

113. In a fine of this sort the render must be made of the lands demanded in the original writ, or of something issuing out of those lands. Thus if the cognizance be made of the manor of *Dale*, the cognizee cannot make a render of the manor of *fale*, or if the cognizance be made of the third part of a manor, the
 render

render cannot be of the whole manor, because the Court can only determine the right of that about which the parties contended, and which was demanded in the original writ: but if the cognizor acknowledges all his right in the lands to be in the cognizee, and the cognizee in return grants and renders to the cognizor a particular estate in the lands, or a rent or common out of it, the render is good, because the determination entirely refers to the things in dispute, one party taking the ultimate property in the land, and the other a particular estate in it; all which is comprehended in the original writ.

114. It follows from the same principle, that the lands must be rendered in the first instance to some person named in the original writ; but an estate may be rendered to a person not named in the original writ by way of remainder, as well as in any other kind of concord. Co. Read. 6.

115. A *fine sur done grant & render* is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void, as the
cognizee

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cognizee can have nothing to render to the cognizor until he is in possession.

Shep. Tou.
18.

116. This species of fine being generally used to create particular limitations of estates, is construed rather as a private deed or conveyance, than as a judgment in an adversary suit; and therefore it need not have such a precise form as other fines.

Tey's case,
§ Rep. 38.

117. Husband and wife levied a fine to *A.* and *B.* and the heirs of *A.* of the manor of *Laver de la Hay*, *Laver Britton*, and several other manors, and a great number of acres of land, meadow, pasture, &c. in *Laver de la Hay*, *Laver Britton*, &c. and in this fine several grants and renders were made. In the third render the manors of *Laver de la Hay*, and *Laver Britton*, *et tenementa predicta* in *Laver de la Hay* and *Laver Britton*, were granted and rendered to the husband and wife, and to the heirs of the husband, and by the fourth render 115 acres of land in *Laver Britton* were granted and rendered to the wife in tail.


After

After the death of the husband, his brother and heir brought a writ of error, and assigned for error the repugnancy between the third and fourth render, for, by the third render all the lands in *Laver Britton* were granted to the husband and wife, and to the heirs of the husband; and, by the fourth render, part of the same tenements were granted to the wife in tail; so that the same lands were granted to two different persons, which was repugnant and erroneous. It was observed, that a fine was of the same nature as a judgment, and as *Brañon* says, *Oportet ut res certa deducatur in iudicium*. But the Court resolved, that the fourth render, as to that which was contained in the third render, should be of the same condition and quality in construction, as a charter or other conveyance between party and party, and need not have such a precise form as a writ or judgment, and therefore that the fourth render was good, and should invalidate the third render as to the 115 acres.

118. If lands be rendered by fine to a person and his heirs, the lands are thereby

1 Rep. 156.

a.

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immediately bound ; and altho' the person to whom the render is made dies before execution, yet his heirs will have the lands ; for the fine having been levied in the life-time of the parties, the lands were so bound by it, that it could not be altered.

CHAPTER IV.

In what Courts Fines may be levied
and before whom acknowledged.

119. **A** FINE being a composition of a suit commenced for the recovery of real property, it might originally have been levied in any court which had jurisdiction to hold pleas of land: and accordingly it appears that, in the early ages of the law, when courts were more numerous, and their jurisdiction more extensive than at present, fines were frequently levied in the Lord's Court, the Hundred Court, and the County Court; and in *Dugdale's Origines Juridiciales* 92. there is a record of a fine which was levied in the county court of *Nottingham* in the reign of king *John*.

Gilb. Ten:
100.
Hale's Hist.
151.
Vide 3 Rep.
Preface.

Fines were also levied in all the courts at *Westminster*, and even before the king himself, as appears from a great number of records which have been published in *Spelman's Glossary*, and by *Dugdale* and *Maddox*.

Dugd. Orig.
Jur. 50. 92.
Maddox
Form. Ang.
No. 364.
4 Inst. 75.
Maddox
Exch. 145.

120. From

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Glan. l. 8.
c. 5.

No. 365,
366, 367.
369. 372.
Roll. Ab.
tit. Fine (C).

120. From the time of the appointment of Justices in Eyre by *Hen. II.* fines were usually levied before them, on account of the pre-eminence of their court over the County Courts; and *Maddox* has preserved several concords of fines which are expressed to have been levied, *coram abbate de Evesham Johanne de Munmul, &c. Justiciariis itinerantibus.*

Court of
Common
Pleas.
4 Inst. 99.

Denham
Read. on
Fines 3.

121. In consequence of the fixed residence of the Court of Common Pleas at *Westminster* by *Magna Charta*, fines were thenceforth usually levied in that court, because therein only could real actions be commenced; however if a record was removed by a writ of error from the Court of Common Pleas into the Court of King's Bench, a composition of the suit might take place there, by which means a fine might be levied in that court.

2 Inst. 515.

122. It is enacted by the statute *de modo levandi fines*, that fines shall be levied in the Court of Common Pleas, or before Justices in Eyre, and not elsewhere, and that a fine shall not be levied unless all the justices are present. But Sir *Edward*

Co. Read. 3. *Coke* says, that the latter part of this statute

tute was repealed by implication by the statute 4 Hen. 7. so that now a fine levied in the Court of Common Pleas before two justices is considered to be equally valid, as if all the Judges were present.

123. An opinion is advanced by Sir *Edward Coke* that a fine cannot now be levied so as to have the force of a final concord in any court but the Common Pleas; and therefore that the king cannot now, in contradiction to this negative statute, grant a power to hold pleas for the purpose of levying fines. He seems also to have been of opinion, that since this statute, fines cannot be levied in any inferior court, unless the privilege of holding such court has been confirmed by Act of Parliament; but this is certainly a mistake, for fines may still be levied in inferior courts, as will be shewn in a subsequent part of this chapter.

2 Inst. 514.
Co. Read. S.
Vin. Ab. tit.
Consuance of
Pleas, B.
pl. 4. E.
pl. 2.

124. The counties palatine of *Lancaster*, *Chester* and *Durham* having private courts of their own, the king's ordinary writs do not run there, so that fines could not be levied in the Court of Common Pleas at *Westminster* of lands situated in those

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those counties, but this defect has been remedied by the following statutes.

*Court of the
county Pala-
tine of Lan-
caster.*

125. By the statute 37 *Hen.* 8. It is enacted that all fines levied before the justices of the county Palatine of *Lancaster*, commonly called Justices of Assize at *Lancaster*, or before one of them, of any lands, tenements, or other hereditaments lying or being within the said county Palatine of *Lancaster*, which shall be openly read and proclaimed three several days in open Sessions, in the presence of the Justices of Assize at *Lancaster*, or one of them for the time being; and also that shall be openly proclaimed in the same manner at the two next general Sessions that shall be holden in the said county Palatine of *Lancaster*, at three several days in either of the said two Sessions, after such manner and form as is commonly used in the Court of Common Pleas at *Westminster*, shall be of like force, strength and effect in law to all intents, effects, constructions and purposes, as fines levied in the Court of Common Pleas.

*Court of the
county Pala-
tine of Chester.*

126. By the statute 2 & 3 *Ed.* 6. c. 23. it is enacted, That all fines levied or acknowledged

known before the high Justice of the County Palatine of *Chester*, or before the Deputy or Lieutenant Justice there, of any lands, tenements, or other hereditaments, lying or being within the said County Palatine of *Chester*, which shall be openly read and proclaimed three several days in the open sessions, in the presence of the Justice of the said County Palatine of *Chester*, or before the Deputy or Lieutenant Justice there, at the same sessions, that the same fine shall be engrossed, and also that it shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the said County Palatine of *Chester*, next after the levying and engrossing such fine, at three several days in either of the said two sessions, after such manner and form as is commonly used in the King's Court of Common Pleas at *Westminster*, shall be of like force, strength and effect in law, to all intents, effects, constructions and purposes, as fines duly levied with proclamations before the King's Justices of his Common Pleas.

127. By the statute 43 *Eliz. c. 15. s. 3.* it is enacted, that it shall and may be lawful to and for all persons, upon any origi-

Court of the county of the city of Chester.

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nal writ or writs of covenant, or any other original writ or writs, whereupon fines have been usually levied, to be purchased out of the Court of Exchequer within the said County Palatine of *Chester*, returnable before the Mayor of the said city, in the Portmoot Court to be holden within the said city, to levy any fine or fines of any lands, tenements or hereditaments, lying or being within the said county of the said city of *Chester*, before the Mayor of the said city, in the said Portmoot Court, in such manner and form as fines may be levied before the high Justice of the County Palatine of *Chester*; and that the Mayor of the said city shall have full power and authority to receive and record all and every such fine and fines, and that all and every such fine or fines which shall be so levied, and which shall be openly read and proclaimed before the Mayor of the said city, in the said Portmoot Court, once at the same Court day that the said fine shall be ingrossed, and once at every of the nine next Court days of Portmoot, next after the levying and ingrossing of such fine, shall be of like force, strength and effect in law, to all intents, constructions and purposes, as
fines

fines duly levied with proclamations before the said high Justice of *Chester*.

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And by *f. 5.* of the same statute it is enacted, That upon all such original writs to be purchased out of the said Court of Exchequer aforesaid, for the levying of any fine or fines within the said city of *Chester*, the Mayor of the said city for the time being shall have full power and authority to award and send forth such like writ or writs, process or precepts of *dedimus potestatem* to any two or more sufficient persons, authorising them to receive, and take the acknowledgment of such person or persons as shall be willing to levy such fine or fines, and by reason of sickness or other reasonable impediment cannot come in person before the said Mayor to make such acknowledgment.

128. By the statute *5 Eliz. c. 27.* it is enacted, that all fines levied before the Justice or Justices of the County Palatine of *Durham*, for the time being authorised for that purpose, of any lands, tenements, or other hereditaments, lying or being within the said County Palatine of *Durham*, which shall be openly read and proclaimed two

*Court of the
County Palatine
of Durham.*

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several days in the open sessions, in the presence of the Justices of Assise at *Durham*, or one of them at the same sessions, that the same fine shall be ingrossed, and also that shall be openly read and proclaimed in the same manner, at the two next general sessions that shall be holden in the County Palatine of *Durham*, next after the levying or ingrossing of such fine, shall be of the same force, strength and effect in law to all intents and purposes as fines duly levied with proclamations before the Queen's Justices of the Common Pleas at *Westminster*.

1 Will. Rep.
275.

129. If a fine is found by verdict to have been levied before the Justices of the County Palatine of *Lancaster*, without finding who those Justices were, and whether they had power to take fines or not; the Court will presume them to be such Justices as had power by statute to take fines in the County Palatine of *Lancaster*, if the contrary does not appear.

Courts of
Great Sessions
in Wales.

130. Upon the reduction of *Wales*, Courts of Justice were erected there, in which all pleas of real and personal actions were to be held, and fines of lands situated there

there are levied in those Courts under the authority of the statute 34, 35 *Hen. 8. c. 26. f. 40.* by which it is enacted that all fines levied before the Justices of *Wales*, of lands, tenements and hereditaments, situated within their jurisdiction, with proclamation made the same session, that the said fine shall be ingrossed, and in two other great sessions, then next to be holden within the same county, shall be of the same force and strength to all purposes as fines levied with proclamations be of, that be levied before the Justices of the Common Pleas in *England*.

131. By the stat. 27 *Eliz. c. 9.* all the clauses in the 23 *Eliz. c. 3.* are extended to fines levied in the Courts of great sessions in *Wales*, and also in the Courts of the Counties Palatine of *Lancaster, Chester* and *Durham*. Vide f. 46.

132. The Isle of *Ely* is a royal franchise, the Bishop having, by a grant from *Hen. 1. jura regalia*, whereby he exercises both a civil and criminal jurisdiction; and therefore fines are levied in the Court held by the Bishop's Justices, of lands situated within the franchise. *Court of the Isle of Ely.*
1 Bac. Ab. 636.

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*Courts of
antient de-
mesne.*
Black. Tra.
4to. 218. 231.

133. The tenure of antient demesne being a species of privileged villenage, the tenants thereof could not sue or be sued for their lands in the King's Courts of common law; but had the privilege of having justice administered to them in the Court of the Manor, by *petit writ of droit close*, directed to the bailiffs of the King's Manors, or to the Lord of the Manor, whereof the lands were held.

2 Inst. 513.

In consequence of this principle, no fine can be levied in the Court of Common Pleas of lands held in antient demesne, for that would be a wrong to the Lord of whom the lands were holden; as they would by that means become frank free, and not impleadable in his Court: but as such tenants were allowed to commence actions in the Court of the Manor, they were also permitted to compound their suits there, by which means fines have at all times been levied of lands held in antient demesne upon little writs of right close in the Court of the Manor.

Hunt v.
Bourne, Salk.
339 Com.
Rep 93. 124.

134. It was found by special verdict that the lands in question were held of the Manor of *Wormelow*, which is *de antiquo dominio*

dominico coronæ domini regis et antecessorum suorum, impleadable in the Court of the Manor *per parvum breve de recto clauso coram seneschallo seſſatoribus et domeſmen ejusdem manerii, ſive eorum locum tenen et attornat* : And that upon writs of right cloſe fines had been time out of mind levied and leviabſe in the ſame Court. That *Thomas Guillym* was ſeiſed in tail of the ſaid lands, and being ſo ſeiſed, 22 *Car. 1.* a fine was levied in the ſaid Court *ſecundum conſuetud. prædict.* before *A. B. locum tenent. Willielmi Kyrle ſeneſchalli et R. attornat. J. S. & W. attornat. J. N. ad tunc ſeſſator. et domeſmen ejusdem curiæ.* Then the fine was ſet forth, and it appeared to have been levied before the attornies of the ſuitors in *placito conventionis ſecundum conſuetudinem manerii, comeceo qu'il a de ſon done.*

It was determined by Lord Chief Juſtice *Holt*, and the other Judges, that a fine might be levied of lands held in antient demefne in the Court of the Manor, though it is not a Court of Record, becauſe it is but agreeable to the power of that Court in other inſtances, for they may proceed to try the miſe joined in a writ of right cloſe, which is of a higher nature than a

Dyer 111. b.

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Fitz. N. B.
12.

fine; whereas in all other inferior Courts, on the mise joined, the cause must be removed into the Common Pleas by *recordari*, and the statute 18 Ed. 1. *de modo levandi fines* is but declaratory of the common law, and was made to rectify a mistake, that fines were leviable in inferior courts upon bills or complaints, which cannot now be either by grant or custom, by reason of the negative words of that statute. But this does not extend to courts of antient demesne, for then the statute 18 Ed. 1. would make fines of those lands leviable in the Court of Common Pleas, which is not the case, such fines being reverfible by the Lord, so that tenants in antient demesne would be under a double disadvantage, for a fine could not be levied of their lands in any court.

1 Bro. Ca. in
Parl. 48.

This judgment was affirmed by the House of Lords.

*Courts of cities
and corporate
towns.*

135. Fines may be levied in the Courts of cities, and corporate towns by custom, where such Courts have power to hold pleas of land.

Madox.

Madox has published a record of a fine levied in the Town Court of the city of *Coventry*, before the mayor and bailiffs of that town; and also a fine levied in the Court of *Fordwick*, to which King *Henry 8.* was a party.

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Form. Angl.
No. 379-394.

136. A fine of this kind is however void, and may be reversed, unless it appears that the Court had a power of taking fines.

In a writ of error to reverse a fine levied in *Shrewsbury* before the bailiffs, the first error assigned was, that it did not appear they had any authority to take fines, and they could not have it by prescription, or by general words in the King's grant.

Waring v.
Whale.
Eliz. 314.

The Court said the fine was void, it not appearing by what authority the fine was levied; for it was in derogation of the Crown and profits of the Crown *pro licentia concordandi*.

S. P. 1. Leon.
188.

137. With respect to the persons before whom fines may be acknowledged, it appears that originally those who were desirous of levying fines, acknowledged the concord

Before whom
fines may be
acknowledged.

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concord in open Court, and fines are still frequently acknowledged in the same manner, the parties appearing at the bar of the Court of Common Pleas: but fines may also be acknowledged out of Court.

Commissioners
appointed by
writ of dedi-
mus patessta-
tem.

Reeves 134.

138. It appears from *Glanville, lib. 11. c. 1.* that the suitors in the *curia regis* were at all times allowed to prosecute their causes by attorney, who was called *responsalis ad lucrandum vel perdendum*; and a plea might be thus commenced and determined, whether by judgment, or by final concord, as effectually as by the principal himself. *Per procuratorem itaque talem potest placitum illud deduci in curia et terminari, sive per judicium, sive finalem concordiam, adeo plene et firmiter ut per eum qui alium loco suo inde posuit.*

In consequence of this rule, fines were frequently levied by attorney, and in the *formulare Anglicanum* there are several records of fines, which appear to have been levied by attorney, the chirograph being worded in this manner---*Hæc est finalis concordia facta, &c. inter Thomam de Preston per Alexandrum Wallensem, positum loco suo ad lucrandum vel perdendum, c. Ramulphum, &c.*

Et. This practice was productive of several frauds (a), and therefore the statute *de modo levandi fines* enacted, that the parties to a fine should appear personally in Court, that the judges might have an opportunity of examining into their age and capacity.

139. The great inconvenience of compelling old and infirm persons to travel from the most remote parts of the kingdom to *Westminster*, produced a regulation which is usually called the statute of *Carlisle*, but which, in fact, is a writ addressed

(a) There is an instance in the rolls of Parliament 18 Ed. 1. No. 9. vol. 1. pa. 22. where a person complains that having demised certain lands to another, for twelve years, and agreed to levy a fine to confirm the demise, he appointed a friend of the lessee's as his attorney for that purpose, who acknowledged a fine of other lands to the lessee and his heirs for ever, *et idem Matheus postea tulisset quoddam breve de conventionione versus ipsum Willelmum de prædicto termino affirmando, prout idem Matheus fecit ipsum Willelmum quandam attornatum facere, ad finem illum levandum coram iusticiariis de Banco; prædictus Matheus tamen fecit et procuravit erga attornatum illum qui fuit de notitia et amicitia sua, quod idem attornatus recognovit alia tenementa que fuerunt ipsius Willelmi, et in scripto inter eos confectis non contenta, Et.*

by

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15 Ed. 2.

2 Reeves 304.

3 Inst. 512.

by *Edw. 2.* to the judges, for their government in taking the acknowledgment of fines. It ordains, That all parties who would acknowledge or render their rights or tenements to another by fine, should appear personally before the justices, so that their age, idiocy, or any other defect might be judged of by them. “ Provided notwithstanding that if any person be by age
“ or impotence decrepit, or by casualty so
“ oppressed and withholden, that by no
“ means he is able to come before you in
“ our Court, then in such case we will that
“ two or more of you by assent of the residue
“ of the Bench shall go unto the party
“ so diseased, and shall receive his cognizance upon that plea and form of plea
“ that he hath in our Court, whereupon
“ the same fine ought to be levied: and if
“ there go but one, he shall take with him
“ an abbot, a prior or a knight, a man of
“ good fame and credit, and shall certify
“ you thereof by the record, so that all
“ things incident to the same fine being
“ examined by him or them, the same
“ fines according to our former ordinance
“ may be lawfully levied.”

In

In consequence of this regulation, a special commission issues out of the Court of Chancery, called a writ of *dedimus potestatem*, directed to a certain number of commissioners, reciting that a writ of covenant is depending before the justices of the Court of Common Pleas, between certain persons therein named, who are incapable from infirmity of appearing personally before the Court, and authorising the commissioners to take the acknowledgment of the said parties concerning the matters contained in the writ, and directing them to certify such acknowledgment under their hands and seals to the Court of Common Pleas.

140. Although this writ still appears to be granted upon a suggestion of infirmity in the parties, yet such suggestion is seldom true, the writ being usually obtained to save the expence or inconvenience of a journey to *Westminster*, or for the purpose of levying a fine in vacation time.

141. The statute of *Carlisle* only gives authority to two of the justices, or to one of them attended by an abbot or knight, to take the acknowledgment of fines; but

not.

Bro. Ab. Tit.
Fine 120.
Co. Read. 9.
2 Vent. 30.

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Wilson 78.

notwithstanding this restriction, writs of *dedimus potestatem* were frequently directed to persons of inferior quality, from whence many abuses arose, which gave rise to the rule of Court, *Pasch. 43 Eliz.* by which it was ordered that no writ of *dedimus potestatem* directed to commissioners, to take the acknowledgment of any fine, should be received or recorded, unless the acknowledgment was taken by some of the justices of the one bench or other, or Barons of the Exchequer, or serjeant at law, or knight who was of the quorum. Custom has however so far prevailed against the positive authority both of the statute and of this rule, that although a knight is always named in a writ of *dedimus potestatem*, yet he seldom is one of those who take the acknowledgment of a fine.

Judges of
Assize.

Jenk. 227.

Dyer 224. b.

142. The Judges of Assize may, in their circuits *per consuetudinem regni*, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law places in their judgment and integrity (a): in such cases
however,

(a) There is a petition in the rolls of Parliament
28 Edw. 3. No. 26. vol. 2. p. 261. from the commons

however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.

143. A writ of error was brought to reverse a fine, and the error assigned was, that it appeared upon record that the acknowledgment of the fine was taken by Chief Baron *Manwood*, on the 27th of *March*, and the writ of covenant and *dedimus potestatem* were tested on the 9th of *April*, so that the acknowledgment was taken without any authority; and by the statute 23 *Eliz.* the day of the acknowledgment ought always to be certified; but the Court over-ruled this objection, saying it was good enough, and that otherwise they should reverse many fines.

Argenton v. Weitover.
Cro. Eliz.
275.

The commissioners appointed by writ of *dedimus potestatem* are directed by the statute 23 *Eliz. c. 23. s. 5.* to certify the

How the acknowledgment is to be certified

mons beyond *Trent*, praying that a justice of one or the other Bench should come twice each year into their counties, to take the acknowledgment of fines.

acknow-

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acknowledgment of the fine within twelve months after it is taken, and also to certify the year and day whereon the same was acknowledged.

Fitz. N. B.
146.

144. If the commissioners, in a writ of *dedimus potestatem*, refuse to certify the acknowledgment of a fine pursuant to this statute, within twelve months, a *certiorari* may be awarded against them, reciting the substance of the writ of *dedimus potestatem*, and the acknowledgement of the fine, commanding them to certify it; and in case of their refusal, an *alias*, a *pluries*, and an *attachment* will issue against them.

Idem.

145. If the commissioners die before they have certified the acknowledgement of a fine, their executors must certify it upon a *certiorari*; and in case of their refusal, the same process lies against them as against the commissioners.

Downes v.
Savage,
Cro. Eliz.
240.

146. If a writ of *dedimus potestatem* be directed to two persons jointly, and only one of them takes the acknowledgement of the fine it will be erroneous.

147. If

147. If a person has several writs of covenant depending against several persons in different counties, he may have a writ of *dedimus potestatem* directed to commissioners to take their acknowledgments severally.

Chap. IV.
Fitz. N. B.
327.

148. A writ of *dedimus potestatem* was awarded to take the acknowledgment of four persons to the same fine. The commissioners returned the acknowledgment of three of the persons only. The Court resolved that the fine should pass as against the three persons who had acknowledged it; and that the name of the fourth person should be erased out of the writ of covenant and *dedimus potestatem*.

Anonymous
Cro. Eliz.
576.

It was resolved in the same case, that if a writ of *dedimus potestatem* be awarded to take the acknowledgment of three persons to the same fine, the commissioners need not take the acknowledgment of all the three persons at the same time, but may take the acknowledgment of one of them at one time, and of another of them at another time.

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149. A fine will not be reversed for any trifling error or mistake in the return made by commissioners under a writ of *dedimus potestatem*.

Earl of Bedford v.
Forster,
Cro. Jac.
77.

A writ of error was brought to reverse a fine taken by commissioners, because upon the back of the writ of *dedimus potestatem* it was *executio istius brevis patet in quodam pannello huic brevi adnexo*, whereas it ought to have been *in quodam schedula huic brevi annexa*. But all the Court held it was but matter of form and not material, for although it be not properly said to be a pannel, yet a pannel and schedule are all one in substance, and no cause to reverse the fine.

Shep. Tou.
5.
Co. Read. 9.
1 Roll. Rep.
223.

150. The writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, and therefore should bear date after the writ of covenant.

Goburn v.
Wright,
Cro. Eliz.
740.
Herbert v.
Binion,
1 Roll. Ab.
727.

A writ of error was brought to reverse a fine levied at *Chester*, because the *teste* of the writ of *dedimus potestatem* was prior to the writ of covenant; and it was held to be a manifest error.

151. But

151. But if the writ of *dedimus potestatem* be tested on the same day with the writ of covenant, the fine will be valid.

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A writ of error was brought to reverse a fine, because the writ of *dedimus potestatem* was tested on the same day with the writ of covenant, which was contended to be erroneous, because the writ of *dedimus potestatem* recites, that the writ of covenant is depending; whereas the writ of covenant could not be said to be depending until its return. But the Court were of opinion that this was no error, for the writ of covenant may be said to be depending immediately on the purchase of it; and if a stranger should buy the lands before the return of the writ of covenant, it would be champerty.

Arundel v.
Arundel,
Cro. Eliz.
677.
Cro. Jac. 11.
5 Rep. 47. b.

152. It is the duty of all those who are appointed commissioners in a writ of *dedimus potestatem*, to inform themselves by means of some people of credit, that the persons who acknowledge a fine before them, are really the parties named in the original writ. They should also be extremely attentive in examining whether there be any married woman, infant, idiot or lunatick

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Petty's case,
2 Freem. 78.

among the parties to the fine, as they are liable to be severely punished by the Court of Common Pleas for any fraud or wilful neglect in the execution of the trust reposed in them by that Court.

*Rules of
court respect-
ing the taking
of fines by
dedimus po-
testatem*

Wilson 82.
Vide Dean
v. Tidmarsh,
Barnes 143.

153. By a rule of the Court of Common Pleas made in *Hil. 13 Geo. I.* it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person who was present when the fine was acknowledged, should appear personally before the Lord Chief Justice of the court, and be examined upon oath touching the execution thereof.

This rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, the Court made the following rules:

Wilson 85.

Hilary 17 Geo. II. "It is ordered, that
"instead of an oath made *viva voce* of the
"due acknowledgement of fines, an affi-
"davit in writing on parchment shall be
"made and annexed to every fine, in
"which the person making the same shall
"swear that he knew the parties acknow-
"ledging such fine, that the same was
"duly

“duly signed and acknowledged, that
 “the party or parties acknowledging and
 “also the commissioners taking the same,
 “were of full age and competent under-
 “standing; that the feme-coverts (if any)
 “were solely and separately examined
 “apart from their husbands, and freely
 “and voluntarily consented to acknow-
 “ledge the same; and that the cognizor
 “or cognizors, and every of them knew
 “the same to be a fine to pass his, her or
 “their estate or estates, which fine, to-
 “gether with such affidavit annexed, shall
 “be transmitted to the Lord Chief Jus-
 “tice, or some other justice of this Court,
 “for his *allocatur* thereon, and such affi-
 “davit shall remain annexed to such fine,
 “and be left with the same in the proper
 “office: And it is ordered that very
 “such affidavit, except where the per-
 “sons, at the time of their acknowledg-
 “ing the fine, are in *Irland*, or some
 “other parts beyond the seas, shall be
 “made by some attorney of the Courts of
 “*Westminster-Hall*.”

Hilary 26 & 27 Geo. II. “It is ordered, Wilson 89.
 “that in the affidavits made in pursuance
 “of the preceding rule, the persons or
 H 3 “persons

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“ persons so making the same shall swear,
 “ that the fine was duly signed and ac-
 “ knowledged upon the day and year men-
 “ tioned in the caption; and if there be
 “ any rasure or interlineation in the body or
 “ caption of such fine, that such rasure or
 “ interlineation was made before the party
 “ or parties signed the said fine, and
 “ before the caption was signed by the
 “ commissioners.”

154. The Court of Common Pleas has in some instances dispensed with these rules.

17 & 28
 Geo 2.
 Say v. Smith,
 Barnes 217.

A fine was taken before *Prentice* an attorney, and *Prentice* a tradesman, as commissioners; *Prentice* the attorney died without making the proper affidavit of the acknowledgment of the fine. One of the cognizors became a bankrupt, absconded, and did not surrender within the 42 days, as required by the statute. The fine was ordered to pass, on an affidavit of the due acknowledgment of it by *Prentice* the tradesman, notwithstanding the general rule requiring such affidavits to be made by attorneys.

155. Where

155. Where fines have been acknowledged out of the kingdom, the Judges have also remitted the strictness of these rules.

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The Lord Chief Justice, assisted by Mr. Justice *Clive*, made an order, that a fine should pass as to two of the cognizors, considering the particular circumstances of the case, notwithstanding the same was not signed by them. One of the commissioners attended and made oath, that this fine was duly acknowledged before him, and another commissioner by the cognizors at *Naples in Italy*, that the parties were of full age and good understanding: that the married woman was examined apart from her husband, and freely consented. The fine being taken from persons beyond seas, it was not within the order of the Court, requiring an affidavit; and the signing of a fine by the cognizors is not absolutely necessary.

19 Geo. 2.
Fleetwood
v. Calender,
Barnes 219.

156. Two fines taken at *Hamburgh*, where the cognizors resided, were ordered to pass by all the four Judges, upon an affidavit by a commissioner, of the due execution of each fine sworn before a clerk

24 Geo. 2.
Heathcock
v. Hanbury,
Barnes 217.

Ch. p. IV. in the chancery of the city of *Hamburg*,
 and authenticated by his certificate or attestation as a notary publick.

Seton v.
Sinclair,
 2 Black.
 Rep. 880.

157. A fine was taken at *Edinburgh*, and was regular in every respect, except that it was not taken in the presence of an attorney of any of the Courts of *Westminster-Hall*, who might have made the usual affidavit of it's having been duly taken. An affidavit was made by *Seton* the demandant, that there was no such attorney in or near *Edinburgh*; and the Court, on the motion of Serjeant *Davy*, who cited *Say v. Smith*, allowed the fine.

Lord Chief
Justice of the
Common
Plas.

1 Hen. 7.
 9. a.
 2 Inst. 512.
 Co. Read. 9.

Dyer 224. b.

158. The Lord Chief Justice of the Court of Common Pleas may alone take the acknowledgment of a fine out of Court, a privilege peculiar to that office, and which seems to be derived from custom and usage, for it does not appear that this power is given to the Lord Chief Justice by any statute. *Capitalis iusticiarius de banco solus per prerogativum officii sui potest capere recognitiones finium, absque dedimus potestatem.*

If

If the Lord Chief Justice of the Court of Common Pleas be a party to the writ he cannot take the acknowledgement of that fine *quia judex in propria causa*. This rule extends to all other judges and commissioners.

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Year Book
8 Hen. 6. 21.
Dyer 220. b.

159. By the statute 34 & 35 Hen. 8. c. 26. s. 40. it is enacted, that fines shall and may be taken before the justices of *Wales*, of lands, tenements and hereditaments situated within their jurisdiction; by force of their general commission without any writ of *dedimus potestatem*, to be sued for the same, in like manner and form as is used to be taken before the king's Chief Justice of his Common Pleas in *England*.

*Justices of
Wales.*

CHAPTER V.

Of the Parties to a Fine.

*Who may
levy fines.*

160. **A** FINE being considered as a common assurance or conveyance of real property, it follows that all persons of full age and sufficient understanding may in general levy fines of those lands in which they have any estate of freehold, either by right or by wrong.

Elliot's case,
Carter 53.
Griffin v.
Ferrers,
Barnes 19.
Keys v. Bull,
Id. 23.

161. Even persons who are blind, deaf, or dumb, or who are both deaf and dumb at the same time, may levy fines, if it appears that, notwithstanding those disabilities, they are capable of comprehending the nature and consequences of a fine, and can express their meaning by writing or signs: and there are three instances of persons born deaf and dumb, who were permitted to levy fines.

The King.
Dugd. Orig.
Jur. 93.
Maddox
Form. No.
394.
7 Rep. 32.

162. There are several records of fines published by *Dugdale* and *Maddox*, to which the king is a party. It was however much doubted in the reign of *James I.* whether

whether the king could levy a fine; and his majesty having consulted Lord Chief Justice *Popham* and Sir *Edward Coke* (then Attorney General) on this subject, they gave it as their opinion that altho' the king could not be cognizor of a fine, because a writ of covenant could not be brought against him, yet that if a fine was levied to the king, he might then make a grant and render, which would be good and sufficient to bind him.

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163. The queen may levy a fine, and a fine may be levied to her; for she has in every instance, the particular privilege of suing and being sued alone, and is considered in all legal proceedings as a feme sole, and not as a feme covert.

The queen.

1 Int. 3. a.

132. a.

4 Rep. 23. b.

164. As married women might always be impleaded jointly with their husbands, it follows that they could join with their husbands in levying fines: and it appears from a passage in *Glanville*, and some very antient records published by *Maddox*, that it was formerly usual for married women to appoint their husbands as their attornies to levy the fine for them.

Married women.

Lib. ii. c. 3.

Form. Angl.

No. 357.

Thus

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Maddox
Dist. I. 18.

Thus in 9 Rich. I. the prior and convent of *Lewis* fined to the king in half a mark, *ut concordia facta inter Ricardum de la Combe, & Sybillam de Dene, uxorem suam, presentes per eundem Ricardum virum suum, positum loco suo, ad lucrandum vel perdendum, et Willielmum priorum et conventum de Lewis tenentem, per Willielmum monarchum suum de advocacione ecclesie de Waldern, unde recognitio de ultima presentatione summonita fuit inter eos in prefata curia, scribatur in magno rotulo.*

18 Ed. 1.
2 Inst. 515.

It is probable that married women were, in consequence of this practice, frequently deceived, and defrauded of their inheritances by their husbands. The statute *de modo levandi fines* therefore directed, that if a feme covert be one of the parties to a fine, she ought first to be examined by the justices, and if she refused her assent to the fine, it should not be levied.

2 Inst. 515.
3 Ark. 712.

165. When a married woman is party to a fine, she ought to be examined secretly and apart from her husband, pursuant to this statute, that the Judges or Commissioners may inform themselves whether



whether she joins in the fine of her own free will, or is compelled to it by the threats and menaces of her husband. Every thing contained in the writ should be distinctly named to her; and she ought to be informed of the consequences of her assenting to the fine. But although the statute *de modo levandi fines* thus positively directs the private examination of a married woman, yet if she is allowed to acknowledge a fine without being examined, it will bind both her and her heirs for ever, there being no mode of reversing such a fine; because it cannot afterwards be averred that the married woman was not examined, the contrary being recorded.

166. The private examination of a married woman is, however, not directed in all cases, as that circumstance was prescribed by the Legislature, only to prevent married women from making an imprudent disposition of their property at the instance of their husbands; so that where a husband and wife acquire any interest by a fine, and depart with nothing, the wife need not be examined, because in that case she cannot possibly be prejudiced. It may therefore be laid down as a certain

1 Inst. 515.

Lit. f. 670.
1 Inst. 553
b.

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tain rule, that a married woman need only be privately examined in levying a fine, where she joins in granting some estate, or departing with some interest.

Roll Abr,
Tit. Fine
(M. 1.)

If a fine be levied to a husband and wife who grant and render a rent, the wife ought to be examined, because by the render she makes herself liable to the payment of the rent.


7 Rep. 8. a.
10 Rep. 43 a.
1 Inst. 46 a.
Hob. 225.

167. If a married woman levies a fine of her own inheritance without her husband, it will bind her and her heirs, because they will be estopped to claim any thing in the lands, and cannot be admitted to aver that she was a married woman, that being contrary to the record. But her husband may enter and defeat such fine, either during the coverture, to restore himself to the freehold which he held *jure uxoris*, or after her death, to restore himself to his tenancy by the curtesy; because no act of a *feme covert* can transfer that interest which the marriage has vested in the husband; and if the husband avoids the fine during the coverture, neither the wife nor her heirs will be barred by it; for, by the

1 Inst. 46. a.
n. 7.

entry

entry of the husband, the whole estate which passed by the fine is defeated, and the old estate of the wife reverted in her, and the husband becomes again seised in right of his wife.

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Even an entry by the husband into part of the land, whereof the wife alone levied a fine, will avoid the whole fine.

Mayo v. Combes, 2 Freem. Rep. 396. Pollexf. 164.

168. If a married woman levies a fine executory as a *feme sole*, and execution is sued against the husband and wife, the husband may stop the execution of the fine, because no act of his wife's can prejudice him. And if in a case of this kind the husband had made default, and his wife was received in his stead, she might for the benefit of her husband, prevent the execution of her own fine, but, after the death of her husband, she cannot avoid it.

Co. Read. 7. Perk. f. 20.

169. If a woman levies a fine by the name of *Mary*, the wife of *Thomas Stiles*, it will be void; because it appears by the very record itself that the cognizor was a married woman.

1 Siderf. 122.

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170. It is agreed that a wife may, without her husband, execute a naked authority, though no special words are used to dispense with the disability of coverture : but if the legal estate in lands is vested in a married woman in trust for another, some hold that she cannot pass it to the *cestui que trust* unless her husband joins ; and therefore, that if she makes a feoffment, or levies a fine without him, the first will be void, the latter voidable : but others are of opinion, that the husband's joining is not more requisite in this than in the former case.

W. Jones
137. 1 Inst.
112 a. n. 6.

171. The following is the only case where a married woman has been allowed to levy a fine without her husband.

Moreau's
case.
2 Black.Rep.
1205.

Upon a motion that *Ann Moreau*, wife of — *Moreau*, might levy a fine without her husband, it appeared that the lands had been sold by the husband, who covenanted that he and his wife (when of age) should levy a fine. When the wife came of age, she refused to join in it ; but it was levied by the husband alone, who afterwards went abroad. The wife now consented to levy it, but the husband was absent. It was said that

that it had been usual in such cases for the curfitor to make out a *præcipe* to the wife as a *feme sole*; but no example of it was produced upon the motion. The Court would make no rule to authenticate such a fine; but it was afterwards acknowledged *de bene esse* before the Lord Chief Justice then in court.

172. Coparceners, joint-tenants, and tenants in common, may levy fines of their respective shares; and if there be two joint-tenants in fee, and one of them levies a fine of the whole, this will not amount to an ouster of his companion: but it is a severance of the jointure, though they continue to be in of the old use.

Coparceners, joint-tenants, and tenants in common.

1 Rep. 58. a.
6 Mod. 45.
1 Salk. 206.

173. Persons outlawed or waved in personal actions, may alien by fine; for their estates still remain in them, although they have forfeited the rents and profits.

Persons outlawed, &c.
West Symb.
p. 2. f. 13.

174. Having enumerated the persons who are capable of levying fines, we shall now examine who are disabled from being cognizors, or conveying by fine. This disability may arise either for want of a sufficient estate in the lands, a competent de-

Who are disabled from levying fines.

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gree of judgment and understanding, or from being incapacitated by their situation, or by some positive act of Parliament.

Persons having no estate of freehold in the lands.

Shep. Tou.

14. West.

Symb. p. 2.

§. 13.

175. No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in them, either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it; so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands whereof the fine is levied, it will only bind the parties themselves, and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.

Infra.

176. A fine levied before entry or receipt of rent, will be void upon the same principle.

Lord Townsh.

and v. Ash.

3 Atk. 336.

Upon a bill filed for a share in the New River water, the defendants pleaded a fine and non-claim, but it appearing that there was no entry nor receipt of rent until after the

the fine was levied, Lord *Hardwicke* said there was not a sufficient *seisin* to support the fine. His Lordship also observed, that the receipt of rent with a continuance of possession before the levying the fine, might have been sufficient, because those acts would shew *quo animo* the fine was levied: so that if the rents had been received by the defendants before the fine was levied, and continued to be paid to them, it would have been the strongest evidence of possession.

177. The tenant in possession will not be allowed as an evidence to prove the estate of a landlord who levies a fine, because he would then be a witness to support his own possession.

Doe v. Williams.
Cowp. 621.

178. A person having a defeasible right only to lands, may notwithstanding levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands.

Sir *Michael Armin* being seised in fee of the manors of *Pickworth* and *Willoughby*, by his will devised, that in case his personal estate, &c. should not be sufficient to pay

Carter v. Barnardiston.
1 P. W. 505.
13 Vin. Ab.
336.

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his debts, then his executors should receive the rents and profits of his whole real estate, and after payment thereof, he devised the manors of *Pickworth* and *Willoughby* to his uncle *Evers Armin* for life, and in case he should have issue male, then to such issue male and his heirs for ever; and in case he should have no issue male, he devised the manor of *Willoughby* to his nephew Sir *Thomas Barnardiston* in fee. Upon the death of Sir *Michael Armin*, *Evers Armin* entered upon the premises devised to him, and devised them to his grandson *Armin Bullingham*, and the heirs of his body. Upon the death of *Evers Armin*, Sir *Thomas Barnardiston* entered upon the premises, claiming the same by virtue of the remainder limited to him by the will of Sir *M. Armin*. *Armin Bullingham*, the devisee of *Evers Armin*, entered upon the manor of *Willoughby*, claiming title thereto, and put his cattle into some part of the land, upon which ensued a replevin, and the special verdict in 3 *Lev.* 431. and 2 *Salk.* 224. This suit was afterwards compromised between Sir *Thomas Barnardiston* and *Armin Bullingham*, who both joined in a fine of the manor of *Willoughby*; but previous to this Sir *Thomas Barnardiston* had conveyed the premises by

by lease and release to Sir Samuel Barnardiston in mortgage.

It was contended that this fine was void, as neither of the parties had an estate of freehold in the lands; but the Lord Chancellor held, “that in this case it could not be said that *partes finis nihil habuerunt*, because Armin Bullingham, on the death of Evers Armin, and as his devisee, had a right against all persons whomsoever but the heir of Sir Michael Armin the testator, and Barnardiston, entering upon him as a disseisor; and though Barnardiston afterwards mortgaged the premises in fee, yet he continuing in possession thereof, and joining with Bullingham in the fine, it could not be said that *partes finis nihil habuerunt*, when one of them, viz. Barnardiston, had the possession, and the other of them, viz. Bullingham, had the right to the land against Barnardiston, and also against his mortgagee.”

179. If a person who is only possessed of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to

3 Rep. 17. b.

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strangers, because the cognizer has no estate of freehold.

Co. Cop. f.
55.

180. It follows from the same principle, that if a copyholder levies a fine of his copyhold, it is void, because the freehold is in the Lord.

1 Inst. 337. a.
note.

181. The only mode by which a tenant for years or a copyholder can levy a fine, so as to give it any force, is by first making a feoffment, by which means he acquires a freehold by disseisin. This doctrine has however been lately questioned.

Vide Recoveries.

Ante f. 49.
3 Rep. 29. b.

182. There are two cases in which a fine is allowed to operate, although the parties have no estate of freehold in the lands. The first is where a *cestui que trust* levies a fine of his trust estate, of which the reason will be given in a subsequent part of this work. And the second is when a fine is levied by a vouchee to the demandant, or from a demandant to a vouchee, which is allowed, because in law the vouchee is supposed to be tenant of the land, though in fact he never is so at present.

183. The

183. The averment *quod partes finis nihil habuerunt* cannot be made by a person claiming as heir to the cognizor of a fine, and making his title to him or through him. But where a person makes mention of any of his ancestors, in the course of his pedigree only, and not as one from whom he claims, he is not barred by his fine, but may aver *quod partes finis nihil habuerunt*.

William Rogers, an idiot, being seised of a reversion fee, *Andrew Rogers*, his uncle, levied a fine of the lands with proclamations to a stranger, and died in the life-time of his nephew: upon the death of the idiot without issue, the grandson of *Andrew Rogers* entered and claimed the lands as heir at law to the idiot; and the question was, whether he was barred by the fine of his grandfather. *Croke* and *Berkeley* were of opinion, that as the lands never descended on *Andrew Rogers*, his grandson was not barred by his fine, but might aver *quod partes finis nihil habuerunt*, for he claimed nothing from him, but only mentioned him in the course of his pedigree.

Edwards v. Rogers, Cro. Car. 524.
543. 1 Vent.
418. Sir W. Jones, 456.

184. An alien not being capable of holding lands, ought not to be permitted to

Allen.
13 Vin. Abr.
228.

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levy a fine: but if he does levy a fine, it will not conclude the king after office found.

Persons wanting judgment and understanding.

2 Rep. 53. a.
10 Rep. 42. b.

185. All those who from a deficiency of judgment or understanding are incapable by law of contracting, are likewise incapable of being cognizors in a fine: but with respect to persons of this description, it will be proper to premise one observation, that whatever legal defects may be in the cognizor, if the judges or commissioners once admit him to levy a fine, such fine will for ever afterwards be as valid and effectual as if the cognizor was not under any legal disabilities, except in the case of an infant; although the judges or commissioners omit a very necessary part of their duty, in permitting such persons to levy a fine.

Ante f. 67.
Hob. 224.

This rule arises from a principle which has been mentioned in a preceding part of this work, that no averment can be made against any fact which is once upon record, and as the admission of a person to levy a fine supposes him to be free from all legal defects and disabilities, (for the law will never presume that the judges under whose inspection the fine was levied, would allow it

it to pass, unless the parties were capable of levying it); therefore, although the fact should be otherwise, yet no averment can ever afterwards be admitted to the contrary.

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186. By the common law, infants, or persons under the age of 21 years, are incapable of binding themselves by any contract, which may turn to their prejudice, on account of their supposed want of judgment and discretion at that period; in consequence of this principle, an infant is incapable of being cognizor in a fine; but if an infant is permitted to levy a fine, and that fine is not reversed during his minority, it must for ever afterwards stand good (a).

Infants.
9 Vin. Ab.
387.

3 Keb. 480.
p. 13.

(a) In the rolls of Parliament 50 Ed. 3. No. 127. vol. 2. p. 342. there is a petition from the Commons, complaining of the very great hardship of not permitting a person who had levied a fine when an infant to reverse it after he attained his full age, and praying that every person who had levied a fine during his infancy, should be allowed a certain time, such as two years after he attained his full age, to reverse it; to which the King answered, that he would consider against the next Parliament, whether it would be proper to alter the old law in this point or not.

The

Chap. V.

The reason that an infant is restrained from reversing a fine levied by him, unless it is done during his minority, is, because that fact can only be tried by an inspection of his person in open court.

1 Inst. 131.

a. 380. b.

12 Rep. 123.

Non testium testimonio, non juratorum veredicto, sed judicis inspectione solummodo.

This mode of trial is adopted, because every judicial act shall be intended to have been rightly done, until the contrary appears; and therefore it is fitter that the propriety of such an act should be tried by the court, than by a jury.

9 Rep. 31.

187. In cases of this kind a writ issues to the sheriff, commanding him to constrain the party to appear, that it may be ascertained by the inspection of his person, whether he be of full age or not; *ut per aspectum corporis sui constare poterit, justiciariis nostris, si prædictus A. sit plenæ ætatis necne.*

2 Roll. Abr.
573.

The Judges may also examine the infant upon an oath of *voir dire*, or any of his parents, and inform themselves by means of church books, or any other kind of evidence, if there should still remain a doubt respecting the age of the party.

188. The

128. The peculiar privilege thus given to infants, of averring against a record during their infancy, is probably owing to this cause. The Judges or Commissioners who take the acknowledgment of fines, are supposed to inspect the age of all those who acknowledge a fine before them, pursuant to the directions in the statute *de modo levandi fines*; and if, after such inspection, they are permitted to levy a fine, it is presumed they are of sufficient age; and the infant therefore cannot in that Court aver his disability: but if upon a writ of error brought in a superior Court he is inspected, and found not to be of full age, the fine may be reversed; because the public inspection of an infant by the Judges in a Court of Record, is of equal notoriety and authenticity with a former record of the infant's having levied a fine, (which supposes him to be of full age); and therefore, as both facts are recorded, and contradict one another, the latter fact will prevail. 3 Atk. 711.

If infancy were permitted to be tried by any other mode than the personal inspection of the infant in a Court of Record, averments might be made many years 12 Rep. 122.

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years after a fine had been levied, that the person who acknowledged it was an infant at the time, by which means records might be avoided by bare averments, which would be productive of the greatest confusion.

1 Inst. 131.

a.

Idem 380.

b.

Keckwith's case,

Moore 844.

189. If the person of an infant be inspected by the Judges, and it is once recorded that he is within age, although the infant should attain his full age, or die before the fine is reversed, yet he or his heirs may reverse it, at any time afterwards.

Sarah Griffith's case,

12 Mod. 444.

An infant acknowledged a fine, and the cognizee omitted to get it ingrossed until the infant should attain his full age, in order to prevent him from bringing a writ of error; the Court upon a view of the cognizance produced by the infant, and upon his prayer to be inspected, and to have his non-age recorded, inspected him and recorded his infancy, in order to give him the benefit of his writ of error; which he must otherwise have lost, as his non-age determined before the next term.

The principles here laid down respecting fines levied by infants are confirmed by the following cases: *Ann Hungate's case*, 12 Rep. 122. *Warscomb v. Carrell*, *idem* 124. *Dyer* 220. *Herbert Parrot's case*, 2 Vent. 30. 1 Mod. 246. *Hutchinson's case*, 3 Lev. 36. *Sherlock's case*, Sty 457. *Cousin's case*, 1 Vent. 69. *Requisbe v. Requisbe*, Bulst. p. 2. 320. And *Poyntz's case*, Cro. Jac. 230.

190. By the statute 7 Ann. c. 19. it is enacted, that it shall and may be lawful to and for any person under the age of 21 years, by the direction of the Court of Chancery or Exchequer, on the petition of the persons for whom such infants shall be seised or possessed in trust, to convey and assure any such lands, tenements or hereditaments in such manner as the said Courts shall direct.

Infant trustees may levy fines.

3 Atk. 164.

191. Upon a petition in Chancery praying that an infant, the heir of a mortgagee in fee, who was likewise a feme covert, might convey by fine under this statute, the Master reporting it necessary: Lord Chancellor *Hardwicke* said, this question came before him soon after he had

Ex parte Maire,
3 Atk. 479.
Com. Rep.
615.

Chap. V.

Vide 3 P.
Wms. 387.

Lombe v.
Lombe,
Barnes 217.
S. P.

had the seals, and that he consulted with Lord Chief Baron *Comyns*, who thought the Court might order an infant who was a feme covert to levy a fine: for the act is general, that all persons under age shall convey and assure; and that as a feme covert of full age could not assure but by fine, the Court may direct an infant to convey in the same manner; and an order was made accordingly.

192. By the stat. 4 *Geo. III. c. 16.* it is enacted, that it shall and may be lawful for any infants having estates in lands, tenements or hereditaments, within the duchy of *Lancaster*, or the counties Palatine of *Chester*, *Lancaster* and *Durham*, or in the principality of *Wales*, by the direction of the Court of the Duchy Chamber of *Lancaster*, of the Court of Exchequer of the county Palatine of *Chester*, of the Court of Chancery of the county Palatine of *Lancaster*, of the Court of Chancery of the county Palatine of *Durham*, and of the several Courts of the Great Sessions in *Wales* respectively, to convey and assure any such lands, tenements or hereditaments, in such manner as the said several Courts shall direct.

193. Idiots,

193. Idiots, lunaticks, and generally all persons of non-sane memory, are incapable of levying fines; and the statute *de modo levandi fines* expressly directs, that persons of this description shall not be permitted to acknowledge a fine: but still, if the Judges or Commissioners allow them to levy a fine, it can never afterwards be reversed by any averment that the cognizors laboured under any of those disabilities, because the record and judgment of the Court being the highest evidence in the law, the cognizors must be presumed to have been capable of contracting at the time, and therefore no averment can be admitted to the contrary: and it is said that even a declaration of the uses of a fine by an idiot or lunatick will be good.

4 Rep. 124.

194. One *Henry Busbley*, a monstrous and deformed cripple and idiot, was taken from his guardian, and carried to a place unknown, where he was kept in secret, until he had acknowledged a fine of his lands before Justice *Southcot*, to one *Bothome*, and had declared the use of the fine to *Bothome* and his heirs.

12 Rep. 124.

Henry

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Henry Busbley was afterwards found by inquisition to have been an idiot, *a nativitate*, and upon an action brought by a person who claimed under *Bothome*, the idiot was sent out of the Court of Wards upon a man's shoulders, to be shewn to the Judges of the Court of Common Pleas. Lord Chief Justice *Dyer* said, that the judge who took the fine was not worthy to take another: but notwithstanding this, and although the monstrous deformity and ideocy of *Busbley* was apparent and visible, yet the fine stood good.

It was moved as a doubt in the Court of Wards, whether this fine should not enure to the use of the idiot and his heirs; for although it was agreed, that the fine, being of record, bound the idiot, yet it was contended, that the deed executed by the idiot, was not sufficient to direct the uses of the fine; but it was resolved, "That for as much as he was enabled by the fine as to the principal, he should not be disabled to limit the uses which are but as accessory."

2 Rep. 58. ♣
Hob. 224.
Vide infra.

Hugh
Lewing's
case, 10 Rep.
42.
Winch 106.

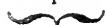
195. One *Hugh Lewing*, who was an idiot, and so found by office, levied a fine, and

and declared the uses of it by indenture. It was resolved in the Court of Wards by the Lords Chief Justices *Wray* and *Dyer*, that both the fine and declaration of uses should stand good, as neither *Hugh Lewing* nor his heirs could aver that he was an idiot: and it was said by the Court, that they would sooner suppose the office found to have been erroneous, than bring a judicial act into question, or the judgment of the Court in which the fine was levied.

196. A complaint was made to the Court of Common Pleas by *Thomas Cust*, supported by many affidavits, setting forth, that *Johanna Lister*, one of the cognizors, in a fine lately levied, had for some years past been disordered in her senses, and was so at the time when the said fine was levied. The Court thereupon made a rule to shew cause why the fine should not be vacated, and for *John Hancock*, one of the commissioners, (who, with two others took the fine by *dedimus potestatem*) to answer the matters in the affidavits. Upon an enlargement of the rule, the Court recommended it to them to produce the said *Johanna Lister*, who resided in *Yorkshire*, and accordingly she was brought into

Lister v. Lister,
Barnes 218.

Chap. V.



Court: and being examined by the Lord Chief Justice, appeared to be a person of good capacity, and very well to understand the intent of a fine, and the deed declaring the uses thereof, which was in favor of her husband, with whom she had lived many years, and upon whom she was desirous to settle her estate, and prevent its descending to the said *Thomas Cust*, her nephew and heir at law. The Court discharged the rule, with costs of the application, and the expences of the said *Johanna's* journey to *Westminster*, to be paid by *Cust*.

Corporations.
Co. Read. 7.

197. Corporations aggregate cannot levy fines; because, as they are invisible bodies, they can only appear by attorney: whereas the stat. *de modo levandi fines* requires that the parties to a fine shall appear personally before the Judges. But Sir *Edward Coke* says, that a sole corporation may acknowledge a fine.

198. There are some persons who are restrained from levying fines among other modes of alienation by particular statutes.

Women seised
of jointures.

Thus, by the statutes 11 Hen. 7. c. 20. and 32 Hen. 8. c. 28. women seised of jointures

tures or estates tail of the gift of their husbands; and husbands seised *jure uxoris*, are prohibited from levying fines of such estates. An account of these statutes, and of the several cases which have been decided on them, will be given in *Recoveries*.

199. All ecclesiasticks seised in right of their churches, as archbishops, bishops, deans and chapters, masters and fellows of colleges, &c. are restrained by a variety of statutes from alienating their church lands, for any longer time than for three lives, or twenty-one years, in consequence of which they are by implication prohibited from levying fines.

*Ecclesiasticks
seised jure ec-
clesiæ.*

1 Eliz. c. 19.

f. 5.

13 Eliz. c. 10.

200. With respect to the persons who are capable of being cognizees, and of taking any estate by fine, it will be sufficient to observe, that all those who are enabled by the common law to take by way of grant, may also take an estate by fine, as infants, married women, corporations sole or aggregate (for an estate may be taken in a fine by attorney); or any other person, except those who are considered in law as civilly dead.

*What persons
may take lands
by fine.
Shep. Tou. 7,*

CHAPTER VI.

Of what Things a Fine may be levied.

3 Vin. Ab.
287.
Co. Read. 11.

201. **A** FINE may be levied of every species of real property, as of an honor, manor, barony, leet, messuage, dove-house, garden, orchard, land, meadow, pasture, wood, underwood, fishing, warren, fair, toll, waifs, estrays, common, &c. And in general it may be laid down as a certain rule, that a fine may be levied of every thing whereof a *præcipe quod reddat* or *faciat* lies.

Idem.

There are even some things whereof a fine may be levied, although a *præcipe quod reddat* cannot be brought for them, as an office, for which neither a *præcipe* nor an assise lies, but only a *quod permittat*.

8 Rep. 145.
b. 1 Wilf. R.
p. 2; 242.

202. A fine may be levied of an advowson in gross, or right of presentation to an ecclesiastical benefice, of which there are a variety of instances in the books.

203. **A**

203. A fine may be levied of a chief rent, a rent charge, or any other rent which is actually *in esse*; but a fine cannot be levied of an annuity to a man and his heirs, because it is only a personal inheritance.

Chap. VI.
Shep. Tou.
11.
1 Stra. 106.

204. A fine may be levied of any thing that lies in prender, provided it can be ascertained with sufficient accuracy; but of things uncertain, such as a common without number, a fine cannot be levied.

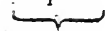
205. As fines may be levied of every kind of real estates in possession, so they may also be levied of all lands, tenements, or hereditaments, to which the parties are intitled in remainder or reversion.

Shep. Tou.
13.

206. A fine may be levied of an undivided part of a manor, messuage, or other real estate, as well as of the whole, and the writ must be for an undivided moiety, third or fourth part of, &c. &c. But if an entire thing, as a manor or messuage, be parted, as if the manor of S. be divided into two parts (if the division be so made that the manor of that part be not extinct) and a fine is levied of a part of it, it must pass by

Moor 250.
3 Rep. 88.
Shep. Tou.
12.

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the name of the whole, as *de manerio de S. cum pertinentiis*.

207. At the dissolution of monasteries by *Hen. 8.* the appropriations of the several rectories, parsonages, and other ecclesiastical benefices, which belonged to the religious houses, became vested in the king, who granted them to lay persons: and in order to enable such persons to exercise every act of dominion over their new acquisitions, it was enacted by the statute 32 *Hen. 8. c. 7. s. 7.* that in all cases where any person or persons should have any estate or interest in any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profit which should come into temporal hands and lay uses, they should have the same remedies as for other lands and tenements; “ And that writs of
 “ covenants and other writs of fines to be
 “ levied, and all other assurances to be had,
 “ made or conveyed of any parsonage, vicar-
 “ age, portion, pension, or other profit called
 “ ecclesiastical or spiritual, as is aforesaid,
 “ should be thereafter devised and granted
 “ in Chancery according as had been used
 “ for fines to be levied and assurances to be
 “ had or made, or conveyed, of lands, te-
 “ nements,

“ nements, or other hereditaments; and
 “ that all judgments to be given upon any
 “ of the said writs original, so to be devised
 “ or granted, of or for any of the premisses,
 “ or any of them, and all fines to be levied
 “ and acknowledged in any of the king’s
 “ said courts thereof, should be of like
 “ force and effect in law, to all intents and
 “ purposes, as judgments given, and fines
 “ levied of lands, tenements and heredita-
 “ ments in the same courts, upon writs ori-
 “ ginal therefore duly pursued and prose-
 “ cuted: albeit no such form of writs ori-
 “ ginal out of the said Court of Chancery
 “ had theretofore proceeded or been a-
 “ warded.”

208. A fine may be and is usually levi- 2 P. W. 127.
 ed of New River shares, by the description
 of so much land covered with water; and
 whenever a fine is necessary to be levied of
 such shares, as the New River runs through
 three counties, *Hertford*, *Middlesex*, and
London, there must be three several fines
 for each of those shares, one being necessa-
 ry for each county.

209. It has long been established in equi- 1 P. W. 130.
 ty, that where a sum of money is covenant-

Chap. VI.

ed or directed to be laid out in the purchase of land, such money is considered as land; but still a fine cannot be levied of it until it is actually laid out in the purchase of land.

By what descriptions.

210. With respect to the descriptions which are necessary to be used in a writ of covenant, of those things whereof fines are levied, they should be the same as those which are used in a *præcipe quod reddat*, in an adversary writ: but a fine being now considered as a common assurance or conveyance by consent, it is construed more favorably than a judgment.

13 Vin. Ab.
280.
Co. Read. 12.

211. An honor may pass by the name of a manor, or by its proper name, as *de honore de T.* or *de manerio de T.* and where a manor is demanded, it is sufficient to describe it by its name, without mentioning the town wherein it lies, for it may be out of any town, or extend into several towns.

West. Symb.
f. 27.

212. Where a manor extends into several towns, as *A. B.* and *C.* it is good to express all or none; for if any one of the towns be omitted, it is said, no part of the manor situated in that town will pass; although

though a fine of the manor with the appurtenances would have carried the whole manor.

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213. It was formerly held that where a fine was levied of a manor, nothing but a real manor would pass, and not a reputed manor. But it has long since been agreed that a manor in reputation only will pass in a fine by the word manor; and that when a fine is levied of a manor with its appurtenances, lands reputed to be parcel of the manor will pass.

Mallett v. Mallett.
Cro. Eliz.
524. 707.
Sir M. Finch's case, 6 Rep.
63. 13 Vin.
Ab. 281.

214. If a person has two manors which are both known by the name of *Dale*, and he levies a fine of the manor of *Dale* generally, circumstances may be given in evidence to prove which manor was intended to pass by the fine.

Gilb. Ev. 38.
Bull. N. P.
Ed. 1790. p.
297.

215. Parsonages, rectories, advowsons, vicarages, or tithes impropriate, do not pass by the words "the advowson of the church of S." but by the words "the rectory of the church of S. with the appurtenances;" for the word *rectory*; comprehends the parish church,

Shep. Touch.
12.

Chap. VI.



church, with all its rights, glebes, tithes, and other profits whatsoever (a).

Idem.

When a fine is levied of a right of presentation to a church only, the words are “ of the advowson of the church of S.” and not “ with the appurtenances :” of all vicarages endowed the writ must be “ of the advowson of the vicarage of S.” and not “ with the appurtenances ;” and where no vicarage is endowed, it must pass under these words, “ The advowson of the church of S.”

Shep. T. 12.

216. Land ought to be demanded by the certain measure of its quantity, according to the usual mode by which it is measured, as an acre, oxgang, hide, rood, &c. and by the names which are usually given to the different species of land, as arable, meadow, pasture, &c.

Waddy v.

Newton.

2 Mod. 276.

217. Where a fine was levied of a certain number of acres of land, it became a

(a) *Rectoria pro integrâ ecclesia parochiali cum omnibus suis juribus, prædiis, decimis, aliisque proventuum speciebus; alias vulgo dictum beneficium.* Spelman Gloss. Voce Rectoria.

question whether the acres were to be considered as customary acres, or according to the statute *de terris mensurandis*; nor does it appear how the case was determined; but Sir *Edward Coke* mentions a case where it was adjudged that in a common recovery of a certain number of acres of land, they should be estimated according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*.

Sir J. Bruyn's
case,
6 Rep. 67. a.

218. The particular vill or hamlet, parish, town and country in which the lands lie, ought to be mentioned in the fine: and formerly if a fine was levied of lands lying in two vills, and one of the vills only was mentioned in the writ, the lands lying in the other vill would not pass.

219. Upon a special verdict it appeared that there were two vills, *Walton* and *Street*, in the parish of *Street*, a fine was levied of certain lands in *Street*; and whether the lands in *Walton* passed by that fine was the question. It was adjudged that they did not pass, for *Street* being a distinct vill, and so found by the verdict, although the parish of *Street* comprehended them both, yet the
lands

Stork v. Fox.
Cro. Ja. 120:

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lands in *Walton* were not comprised in the fine. But if the fine had been levied of lands in the parish of *Street*, then all had well passed.

220. A fine may be levied of a close by a known name, without mentioning the vill or hamlet in which it lies.

Monk v. Butler.
Ier. Cro. Jac.
574.

In trespass the question was, whether a fine might be levied of a close by a known name in a vill, without mentioning the vill or hamlet in which it lay? And adjudged that the fine was good enough; for it was but the agreement of the parties; which, being recorded, although there was neither vill nor hamlet mentioned wherein it lay, was good enough. And notwithstanding it was objected that a *præcipe* ought to be in a village or hamlet, or place known out of a village or hamlet, as appeared by all pleadings, for if the place known be within a vill or hamlet, the *præcipe* ought to be brought accordingly: yet it was answered, that this was true in a *præcipe* or other writ to which the defendant was to answer, but this being but a concord and agreement of the parties, and no exception taken, but the fine drawn and passed, it was good.

221. It

221. It was found by special verdict, that *John Easton* being tenant in tail of a certain messuage and lands called *Easton's*, lying in *Bishop's Morchard*, levied a fine thereof by the name of a messuage and 200 acres of land, 50 acres, &c. in *Effington Easton* and *Chilford*, to the use of him and his heirs; and that there was not any vill, or hamlet, or place, known by the name of the messuage or tenement called *Easton's*, out of the vills or hamlets; and that none of the said tenements were in *Effington* or *Chilford*.

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Faveley v.
Easton. Cro.
Car. 269—
276.

The question was, whether upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, was good?

All the Judges delivered their opinions *seriatim*, that the fine was good.

222. If a fine be levied of lands in *A*. and the party hath also lands in *B*. yet if the constable of *A*. is also constable of *B*. all the lands shall pass; for in such case both places constitute the same vill.

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Waldron v.

Rofcarriot.

1 Mod. 78.

1 Vent. 170.

Upon a special verdict it appeared that a fine had been levied of all the cognisor's land in *A.* and that he had lands in *B.* That a tithing-man was appointed in *B.* but that the constables of *A.* exercised their authority not only in *A.* but also in *B.*

Hale, Ch. J. "It is true one parish
 " may contain three vills: the parish of
 " *A.* may contain the vills of *A.* *B.* and *C.*
 " that is, when there are distinct constables
 " in every one of them: but if the constable of *A.* doth run through the whole,
 " then is the whole but one vill in law; or
 " where there is a tithing-man, it may be
 " a vill: but if the constable run through
 " the tithing, then it is all one vill. I know
 " where three or four thousand pounds a
 " year hath been enjoyed by a fine levied
 " of land in the vill of *A.* in which are five
 " several hamlets, in which are tithings;
 " but the constable of *A.* runs through them
 " all, and upon that it was held good for all.
 " Here was a case of the constable of *Bland-*
 " *ford Forum*, wherein it was held, that if
 " he had a concurrent jurisdiction with all
 " the rest of the constables, the fine would
 " have passed the lands in all: in some
 " places

“places they have tithing-men, and no constables.”

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223. The word *tenement* is not a sufficient description of any thing whereof a fine is levied, for a tenement may consist of a messuage, land, meadow, or any other thing which lies in tenure. And there is an instance where a fine levied of two tenements was reversed by writ of error.

Stud and Courtney's case,
1 Leon. 188.

224. When a fine and recovery are of a certain number of acres in *Dale*, it is said that the party interested shall have his election where and in what parts of the estate the fine and recovery shall operate.

13 Vin. Ab.
275.

225. It is also said that the deed by which the uses of a fine and recovery are declared, is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied; and that courts of justice have frequently directed the description of lands in a fine to be amended, in conformity to the deed of uses. But a fine will not pass a greater number of acres than are contained in the writ and concord, although the deed of uses mentions more.

1 Brown Ca.
in Parl. 156.
Eyton v.
Eyton.

Jenk. 254.

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226. A fine does not ascertain, but only comprises the lands whereof it is levied; so that it is in all cases extremely proper to have a declaration of uses, that the precise lands comprehended in the fine, and intended to pass by it, may be ascertained.

2 Atk. 241.

227. There are frequent instances of tenants in fee-simple, who, in levying fines, insert more parcels of land than do actually belong to them: in which cases Lord *Hardwicke* says, a Court of Equity will restrain the operation of the fine, to such lands only as do really belong to the parties.

CHAPTER VII.

Of the Amendment of Fines.

228. **F**INES being now considered as common assurances made with the consent of the parties, the Court of Common Pleas has frequently permitted them to be amended, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's filver, the proclamations, or the description of the lands.

229. The Judges have even in some instances directed the original writ upon which a fine has been levied to be amended; but the propriety of such amendments seems, from some modern determinations, to be extremely doubtful.

A writ of error was brought to reverse a fine; and the error assigned was, that the writ of covenant bore *teste* the 24th of *April*, returnable *quind. Pasch.* which was the 15th of *April*; so that the return was before the *teste*. It was resolved by the whole Court,

Gage's case,
5 Rep. 45. b.

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L

that

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that the writ should be amended, because fines were nothing more than common assurances, entered into with the mutual consent of the parties.

This case, however, is said to be totally mis-reported; and the doctrine here laid down, that an original writ may be amended, has been contradicted by the following determination.

Lord Pembroke v. Lord Jeffries.
1 Salk. 52.
Cases temp. Holt 59.

230. Lord *Pembroke* petitioned the House of Lords for a bill to set aside an amendment made in a fine and recovery, by the Court of Great Sessions in *Wales*. It was referred to the Judges, whether the fine and recovery were amendable in those particulars in which they had been amended, and whether such amendments were warranted by law. One of the amendments was in the original writ, which had been tested six months after the *dedimus* for the caption. Lord Chief Justice *Holt* certified the opinion of the Judges to be, that the writ of covenant being an original writ, was not amendable, either by the common law, or by any statute. That neither the 14th *Edw.* 3. nor the 8th *Hen.* 6. warranted such an amendment.

That

That as to this purpose, there was no difference between adversary actions and amicable ones; for no Court could amend a mistake in a deed, which was as much a common assurance as a fine or recovery, and that *Gage's* case was mis-reported and was not law.

In Lord *Raymond's* Reports, vol. 2. 1066. it is said by Mr. Justice *Powell*, that the *teste* of an original writ was not amendable; that it was so resolved by the House of Lords, with the concurrent opinion of all the Judges, upon consideration of *Gage's* case, in the case of Lord *Jeffries*, and a judgment given in *Wales* upon the authority of that case was reversed; and upon that occasion the record of *Gage's* case was searched for, and found not to warrant the report. And *Holt*, Ch. J. said, that the record of *Gage's* case is in *Coke's Entries*, tit. *Error*, p. 9. 250. where the judgment of the Court is contrary to the report; for the writ was not amended, but the fine was reversed.

231. In a late case, the Court of Common Pleas refused to amend the return of a writ of covenant on which a fine had

Lindsay v. Gray,
2 Black. Rep.
1013.

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been levied, because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *William Blackstone* observes, that the Court gave no opinion as to the propriety of such an amendment in a fair case.

232. A mistake in the entry of the king's silver will be allowed to be amended.

Bohun's case,
5 Rep. 43.

Husband and wife being seised of the manor of *Empoles*, levied a fine thereof by the name of the manor of *Empoles*, and of a great number of acres of land, meadow, &c. according to the common form of fines; and the manor and tenements were valued at 20 marks *per annum*, so that the fine in the Hanaper was 1*l.* 6*s.* 8*d.* and therefore the king's silver or post fine, amounted to 40*s.* The clerk made the entry of the king's silver in this form: *Nich. Bohun dat dominæ reginæ 40s. pro licentia concordandi, &c. in placito conventionis* of so many acres of lands, meadow, &c. omitting the manor: and error being assigned on this point, because the king's silver was not mentioned to be paid, as well for the manor as for the other tenements, it was resolved by all the Judges, that

that the roll of the entry of the king's silver should be amended according to the writ of covenant; the note, the foot, and the certificate of the Judges in these words: *de manore de Empoles, cum pertinentiis ac, &c.* which were omitted thro' the negligence of the clerk, for it appeared that the whole sum was paid, as well for the manor as for the residue of the tenements; so that no prejudice was done to the queen.

233. The proclamations in a fine may also be amended, even after a writ of error has been brought, in which a defect in the proclamations is assigned for error.

Thus the proclamations which were indorsed on the foot of the fine were, pending a writ of error, allowed to be amended, according to the proclamations on the note of the fine remaining with the chirographer. And, in another case, the proclamations of a fine were allowed to be amended, after a writ of error had been brought, in which that circumstance was assigned for error.

Dowling's case, 5 Rep. 44.

Down's case, Idem.

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Peter's
Genealogie,
13 Rep. 54.

234. So where a mistake had been made in the third proclamation on the foot of the fine, and the fourth proclamation was altogether left out; but it appearing that the proclamations upon the record remaining with the chirographer, and in the book of the chirographer were properly made, it was adjudged that the errors in the proclamations should be amended.

Strilley's
case, Hut.
122.

235. In the same manner, where a fine was levied in *Mich. 11 Eliz.* and the proclamations indorsed by the chirographer, were right. But in the note of the fine delivered to the Custos Brevium, the second proclamation appeared to have been made on the 20th of *May*, where it should have been the 23d of *May*. The Court held that it should be amended; for the engrossment upon the fine by the chirographer is the foundation, which being right, is a sufficient warrant to amend the other, though the Court held it a good fine without any amendment.

236. The description of the lands intended to be comprised in a fine is frequently erroneous; but in such cases
whenever

whenever the description is contrary to the intention of the parties, it will be amended, provided such intention appear from the deed to lead the uses of the fine, or any other sufficient circumstances.

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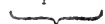
237. Serjeant *Pemberton* moved to amend a fine which was levied of the manor of *Ighfield*, where the deed which declared the uses was of the manor of *Ighfield*, which was the true name, and it was amended.

1 Ld. Raym.
209.

238. It appeared to the Court, after the examination of the plaintiff and defendant, the inspection of a fine levied between the parties, and the indenture declaring the uses of the fine, that by the omission or misprision of the clerk who made and ingrossed the præcipe and concord of the said fine, he supposed the said tenements to lie among others in the parish of *Lanceston*, when in fact there was no such parish within the whole county of *Cornwall*; but it ought to have been in the parish of *St. Stephen's* near *Lanceston*. It was ordered by the Court that as well the præcipe and writ of covenant, as all entries and records of the said fine should

Tregare v. Gennys,
Fig. Recov.
218.

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be amended and rectified, by putting in the words *St. Stephen's near*, as, by law, it ought to be done.

Walker v.
Okenden,
Cases of
Pract. 52.

239. So where a motion was made to amend a fine, by inserting the word *Woorth*, and, on shewing cause, the rule was made absolute for the amendment, although it was objected, that the heirs at law would be prejudiced by the amendment. But the Court said they could not take notice whether it would be prejudicial to the heirs at law or not, as it was the duty of the Court to make the fine agreeable to the deed of uses, and to the intention of the parties.

Forster v.
Pollington,
Barnes 216.

240. Two fines of lands in the island of *Antigua* were ordered to be amended, upon hearing counsel for the cognizee and the heirs at law of the cognizors, who had brought writs of error to reverse the fines. The lands were described in the writs, &c. *In insula de Antegoa in America in partibus transmarinis, viz. in parochia Sanctæ Mariæ Iffington in comm. Midd.* The amendment was by striking out the words *in America in partibus transmarinis*. Articles of agreement between the parties to the fines, to convey

convey and assure the lands in the island of *Antigua*, were read, and *per curiam*, the repugnancy inserted merely through want of skill, and which would vitiate the fines, must be rejected, and the fines made effectual, that is, in common form, if they be then insufficient, advantage may be taken thereof.

241. A fine levied in 1 *Geo. I.* was ordered to be amended according to the deed of uses, by striking out the word *parochia*, and inserting the word *parachiis*; and also by inserting the words *et Melbmerby*. And in *Pasch. 10 Geo. III.* a fine levied in the reign of queen *Anne* was amended by a deed of settlement upon marriage, by altering the name of a parish in the fine, from *Coxley* to *Corley*; upon reading the deed, the indenture of the fine, and an affidavit, that there was no such parish as *Coxley* in the county where the lands lay.

Craghill v. Pattison,
Barnes 24.

Bohoun v. Burton,
3 *Wils. Rep.*
58.

242. The Court of Common Pleas will not however, allow the number of acres inserted in a fine to be increased where the deed of uses is general, and the fine is levied by a husband and wife.

Powell v. Peach,
2 *Black. Rep.*
1202.

On

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On a motion to amend a fine by increasing the number of acres, the deed of uses being general, and the intent only proved by affidavit, Lord Chief Justice *De Grey* observed, that amendments antiently were only of errors in the process of fines, or mistakes in the description of the premises; and these were amended by other parts of the same record: but the amendment then requested varied the extent of the premises from 50 to 84 acres. This, indeed, might be done upon principle, provided it was intended by the parties: but what was the evidence of that intent? The deed to lead the uses could not be legal evidence of the wife's intent, because she was not examined as to the deed, as she was to the fine, and so there was nothing to amend by.

243. Although the Court of Common Pleas will amend a fine in matters of form, yet where a fine is recorded of one term, the Court will not alter it and make it a fine of another.

Heath v. Sir
J. E. Wilmot,
2 Black.
Rep. 778.
Wilson on
Fines 58.

A fine was taken on the 1st of *October* 1770, 10 *Geo.* III. and acknowledged before Commissioners, in which Sir *John Eardley*

Eardley Wilmot (then Lord Chief Justice of the Court of Common Pleas) and others were cognizors, which was passed, ingrossed and recorded as a fine of the preceding *Trinity* term; Sir *John* had nothing in the lands until a few days before he acknowledged the fine, and therefore in the deed to lead the uses thereof, it was covenanted by the parties, that the fine should be levied as of the *Michaelmas* term next ensuing the acknowledgment of the fine, but by mistake the fine was recorded as of the preceding *Trinity* term. Upon producing the deed to lead the uses of the fine and shewing the mistake, it was moved that the fine might be altered, and made a fine of *Michaelmas* term, according to the covenant in the deed of uses; but Lord Chief Justice *De Grey*, and the whole Court observed, that this was not a motion to amend a fine, but to make a new fine; for Sir *John Eardley Wilmot* having nothing in the lands at the time when the fine was levied and recorded, it could only operate as a bar to himself and those claiming under him, so that the granting of this motion might prejudice the rights of strangers.

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244. No change of the Christian names of parties to a fine is allowed by way of amendment.

Dixon v.
Lawson,
2 Black.
Rep. 816.

On a motion to alter the name of the demandant in a fine from *Robert* to *John* on an affidavit by the attorney concerned, that *John Dixon* was the party meant who had purchased a part of the estate, and that no deed to declare the uses of the fine had been executed, the Court refused the motion.

Hut. 122.

245. By the statute 23 *Eliz. c. 3. f. 10.* it is enacted, that no fine levied before that Act, which shall be exemplified under the Great Seal, shall, after such exemplification, be in any wise amended. And by the statute 27 *Eliz. c. 9. f. 10.* no fine levied before that Act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverford West*, or under the seal of any of the counties Palatine, shall, after such exemplification, be in any wise amended.

CHAPTER VIII.

Of the Force and Effect of a Fine at
Common Law, and by the Statutes
18 Ed. I. 27 Ed. I. and 34 Ed. III.

246. **H**AVING stated the various *Force of a
fine at common
law.* circumstances which are necessary to the levying a fine, we shall now proceed to investigate the effects with which it is attended.

By the common law all decisions of the king's courts were allowed the utmost force in ascertaining the rights of the contending parties: now a fine being considered as a composition of a suit actually commenced, and the concord of a fine coming in lieu of the sentence which would have been given in case the parties had not agreed to terminate the suit in this manner, it was allowed to have the same *Plowd. 357.* force and effect as a judgment of a Court of Justice in a real action.

This idea seems also to have been adopted from the civil law; for it is said
in

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Cod. lib. 2.
tit. 4. l. 20.

Vin. de
Transact.
c. 8. n. 3.

in Justinian's code, *non minorem auctoritatem transactionum quam rerum judicatorum esse recta ratione placuit*. And the rule laid down by modern civilians is, *transactio inter ipsos transigentes eandem vim habet quam res judicata, et propterea causa transactione decisa et finita, non magis quam sententia retractatur, nec aliqui nullus sit litium finis*.

247. The delivery of possession by the sheriff after a fine was levied, in pursuance of the writ of *habere facias seisinam*, which issued for that purpose, being equal in point of notoriety to the ceremony of livery of seisin, it was therefore established, that a fine not only transferred the possession, but also the right of possession. It does not however take away the right of entry of those who have a title to the land, unless where it is levied by a tenant in tail in possession, in which case it operates as a discontinuance of the estate tail; so that the remainder-man or reversioner is barred of his entry, and has only a right of action left: for although the statute *de donis* says, *et si finis super hujusmodi tenementum in posterum levetur ipso jure fit nullus*, yet these words were only held to extend to the right of the issue in tail, and not to their possession.

tion. There are however several cases, in which a fine does not operate as a discontinuance of an estate-tail, which will be taken notice of in a subsequent part of this work.

248. A final judgment in a writ of right, and a chirograph of a fine, were originally considered as perfect bars to all claims whatever from the moment they were completed. Thus *Maddox* has transcribed a record of the 10 Rich. I. where *Roger de Wermedale* was impleaded for lands, of which a fine had been levied: and it was adjudged that he should hold the lands in peace, and that none of the said persons could rightfully implead him, as they were in *patria* when the fine was levied, and made no claim: *Recordatum est per eosdem barones quod post finem et concordiam factam inter prædictos Matildum et Rogerum, &c. traxerunt prædictum Rogerum in placitum de tenemento quod annotatur in rotulo præcedente. Et quod judicium fuit, quod Rogerus teneat in pace tenementum prædictum, sicut continetur in cyrographo facto inter ipsum & prædictum Matildum, & quod nullus prædictorum poterit eum implacitare, ex quod ipsi fuerunt in patria quando*

Diff. p. 14,
15.

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quando finis ille factus fuit, & non posuerunt clameum aliquod in terra illa, sicut prædictus Rogerus contra eos dixit in curia regis in placito, & ipsi hoc non defenderunt.

Bracton 436.
a. & b.

The effect of a judgment or fine continued to be the same when *Bracton* wrote; and he justifies it upon the principle, that sufficient time was given both in a real action, and the passing a *chirographum* for all those who had any right to make their claim. *Et sciendum quod statim in ipso placito & factione cyrographi, vel ante iudicium si presens fuerit in curia, vel si in patria vel in regno infra quatuor maria, nec aligare poterit ignorantiam, nisi justum intervenerit impedimentum, nec ulterius audiri debet (ut videtur) quia terminum habet ad minus unius mensis (secundum communem provisionem regni) infra quem venire potest commode post placitum motum, quocumque fuerit in regno, infra quatuor maria, quia quilibet implacitatus debet habere summonitionem 15 dierum ad minus, quæ rationabilis dici poterit summonitio, nec conceditur alicui cyrographum primo die litigii, sed habebit alium diem per spatium 15 dierum ad minus ad capiendum cyrographum suum, ut infra totum illud tempus post qui jus habuerit apponere clameum suum.*

249. A considerable alteration was however made in this respect sometime between the reign of *Hen. 3.* and that of *Ed. 1.* for in the time of this latter prince, all persons were allowed a year and a day to claim against a judgment or fine.

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Thus *Fleta* says, *Excipere enim poterit tenens ex taciturnitate petentis vel alicujus antecessoris sui, ut si subticuerint cum viderint de jure suo litigare, vel finalem concordiam facere & clameum suum infra annum & diem non apposuerint.* But if no claim was made within that period, it then became a perpetual bar to all persons whatever; so that a fine was a mode of acquiring lands, which, after a certain time, secured the title of the purchaser against every kind of claim.

Lib. 6. c. 53.

250. The necessity of some kind of assurance of this kind seems to have been very early felt; for it is a maxim of the highest antiquity in our law, that all sales of personal property in an open fair or market, are not only good and valid between the contracting parties, but are also binding on all strangers who have any right to the things thus sold: and Sir *Edward Coke*, and

2 Inst. 713.
2 Comm. 449.

Co. Read. 1.
Doct. & Stud.
Dial. 1. c. 23.

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the author of *Doctor and Student*, are of opinion that the validity of a sale in an open market, and it's efficacy in binding the rights of strangers, was extended to a fine, for the security of those who were in possession of lands (a).

*Of the statute
de modo levandi
fines.*

18 Edw. 1.

251. The utility of fines, and the propriety of allowing them the utmost force in securing landed property, produced the stat. 18 Ed. 1. ft. 4. usually called the statute *de modo levandi fines*, which was made for the sole purpose of ascertaining the manner in which fines should in future be levied, and of declaring their effect.

This statute, after regulating the forms which were to be pursued in the passing of

(a) The law hath ordained the Court of Common Pleas as a market overt for assurances of land by fine; so that he who will be assured of his land, not only against the seller, but all strangers, it is good for him to pass it in this market overt by fine. 3 Rep. 78. b. For as the common law hath provided a sure and safe way to acquire and get the property of goods by sale in market overt, so also the common law hath ordained a sure manner of conveyance for the purchaser of lands, which, as our statute saith, was by fine. Co. Read. 1.

fines,

fines, proceeds thus:—“ And the cause
 “ wherefore such solemnity ought to be
 “ observed in levying a fine is, because a
 “ fine is so high a bar, and of so great a
 “ force, and of so strong a nature in itself,
 “ that it concludeth not only such as are
 “ parties and privies thereto; and their
 “ heirs, but all other persons in the world,
 “ being of full age, out of prison, good
 “ memory, and within the four seas, the
 “ day of the fine levied, if they make not
 “ their claim of their action within a year
 “ and a day, on the foot of the fine.”

2 Black. Rep.
 994.

252. In the next year after this statute was made, there is a very strong instance of the same principle to be found in the rolls of Parliament.

Rot. Parl. 19.
 Edw. 1. No.
 1. vol. 1. p.
 66.

The King having seized on the manor of *Sobbirs*, for his year, and day, and waste, on account of a felony committed by *Thomas de Weyland*, *Margery* the wife of the said *Thomas*, and *Richard* his son, petitioned the King to be immediately restored to the manor; because they had been enfeoffed jointly with the said *Thomas* for their lives, as well by a charter as by a fine levied in the King's Court, which they produced;

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2 Inst. 511.

and as *Thomas de Weyland* was only seised for life, they contended that the King was not intitled to the year, day, and waste, nor the lord of the fee to a forfeiture. This case was solemnly discussed in Parliament, where it was determined, that, in consequence of the fine, the manor was not forfeited; and in this judgment is the following remarkable passage: *Nec in regno isto provideatur, vel sit aliqua securitas, major seu solemnior, per quam aliquis vel aliquid statum certiores habere possit, vel ad statum suum verificandum aliquod solemnius testimonium producere, quam finem in curia Domini regis levatum, qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, Et hac de causa providebatur.*

Fra^t. 436. b.
2 Inst. 516.
Plowd. 360.

253. The principles of natural justice require, that those who are disabled from pursuing their rights should not be bound by their non-claim; and therefore all those who were under the age of 21 years, in prison, of non-sane memory, or beyond the four seas, when a fine was levied, were excused from making their claim, both by the common law, and by this statute; and no particular time being prescribed to them for pursuing their rights, such persons as happened

happened to labour under any of those disabilities when a fine was levied, were not obliged to make their claim within a year and day after the removal of their disabilities, but were allowed to prosecute their rights at any subsequent period.

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254. By the old law, married women were not bound to make any claim during their coverture, *item excusatur uxor quæ sub potestate viri supposita quod clameum non apposuerit licet mittere possit*. But no saving or exception was made in this statute for married women, because their husbands were always supposed to be capable of claiming for them. However, if the husband were within age at the time when a fine was levied, although the wife was of full age, still the infancy of the husband, whose province it was to make the claim, saved the right of the wife for ever.

Braet. 436. b.
1 Inst. 260. b.
Plowd. 360.

255. In case of a recovery in a writ of right or fine executory, the recovery and fine must have been executed, and the possession delivered to the recoveror or cognizee, otherwise they were no bar whatever; because, until there was a transmutation of possession, strangers were not presumed to

*Of the statute
definibus leuatis.*

Co. Read. 14.
2 Inst. 522.
Plowd. 359.

{ Chap. VIII. have any notice of the alteration of property, and therefore were not obliged to put in their claim.

Co. Read. 18.
2 Inst. 522.
1 Reeves 450.

This rule gave rise to a great number of suits, by the maintenance of the nobility and great Barons, during the insurrections and civil wars which happened in the reign of *Hen. 3.* Averments that there was no transmutation of possession were frequently made against fines, and were usually allowed in the two following cases; first, where a man seised in fee levied a fine to a stranger *sur cognizance de droit come ceo, &c.* and the cognizee granted and rendered back the same lands to the cognizor in tail, for life, or for years; and, secondly, where a tenant in tail accepted of a fine from a person who had nothing in the lands.

256. In these cases, the heirs of the cognizor, who were prejudiced by such fines, were allowed to avoid them by an averment that there was no transmutation of possession. To remedy this inconvenience a statute was made in the 27 *Edw. 1.* called the statute *de finibus levatis*, enacting, that such averments should not thenceforth be admitted.

This

This statute also directed, that the note of every fine should be read in the Court of Common Pleas in two certain days in the week, and that during such reading all pleas should cease.

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257. By the common law, and also by the statute *de modo levandi fines*, all those who had any right to lands whereof a fine was levied, were obliged to make their claim within a year and a day, unless they laboured under some one of the disabilities specified in that act; and it was determined, that, in the case of tenant for life, remainder for life, remainder in fee, if the first tenant for life had aliened his estate, and the alienee had levied a fine, the remainder man for life might enter and avoid the fine, both as to himself, and as to the remainder man in fee: but if the person next in remainder neglected to enter within the year and day, not only he, but also the remainder man in fee, were for ever barred, and a claim by the remainder man within the year and day would not have saved his right, by which means the estates of remainder men and reversioners were frequently barred by the neglect of the particular tenants.

Of the statute of non-claim.

Plowd. 357.
359. 1 Inst.
254. 262.
2 Inst. 52.

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258. This was certainly a very great grievance, and was so severely felt, that to remedy it, the statute of non-claim 34 *Ed.* 3. c. 16. was passed, enacting, “ That the plea of non-claim of fines, which from thenceforth should be levied, should not be taken nor holden for any bar in time to come.”

Rot.Parl.vol.
2. p. 142.

This statute was made in consequence of a petition from the Commons, which is published in the rolls of Parliament, 17 *Edw.* 3. no. 26. *Item que noncleyne des fines levees sur le rendre en temps a venir ne barre nul home de sa action.* To which the King answered, *Il plest au Roi q’ desore cest chose soit fait et q’ estatut’ent soit fait p’ avis des grantz et autres de son conseil.*

The efficacy of fines was entirely destroyed by this statute, and strangers were thereby allowed to claim lands at any indefinite period of time after a fine had been levied of them, which must have been productive of very great inconveniences.

259. The statute of non-claim is still in force with respect to fines which are levied without proclamations; and although such
fines

fines are no bar to the issue in tail, yet when levied by a tenant in tail in possession, they operate as a discontinuance, and of course put the remainder men or reversioners to their formedon, which now, by the statute 21 *Ja.* 1. c. 16. must be brought within 20 years after the right accrues, unless the person who has the right labours under any of the disabilities specified in that statute.

CHAPTER IX.

Of the Force and Effect of Fines by
the Statutes 1 *Rich.* III. 4 *Hen.* VII.
and 32 *Hen.* VIII. in barring Estates
Tail.

Of the Statute

1 *Rich.* 3.

1 *Blackst.* 70.

2 *Blackst.*

267.

260. **I**T has been a constant remark of
those who have had occasion to
trace the history of our *English* jurispru-
dence, that whenever a material altera-
tion was made in the common law, the
inconveniences arising from such change,
have been much greater than those which
were intended to be remedied.

2 *Inst.* 518.

This observation was perhaps more
fully exemplified by the consequences
which attended the stat. of Non-claim,
than by any other innovation which has
been attempted in the common law. On
this subject it is difficult to add any thing
to the force of Sir *Edward Coke's* expres-
sion, "Great contentions arose, and few
men were sure of their possessions." And
it is astonishing that the Legislature should
suffer a grievance which must have been
so universally felt, to continue so long;
for

for the common law respecting non-claim was not revived until the first year of the reign of *Rich. III.* who seems to have attempted to palliate his cruelties, and the usurpation of the crown, by the many excellent laws which he immediately enacted; one of those was the *1 Rich. 3. c. 7.* by which the common law was restored, and the doctrine of non-claim revived.

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Bacon's life
of Hen. 7.
P. 3.

261. This statute was soon followed by the *4 Hen. 7. c. 24.* and as in this last statute all the clauses in the *1 Rich. III.* are copied almost *verbatim*, and some additional matters are subjoined; the statute *1 Rich. III.* is now become useless and obsolete, and the whole effect of fines depends almost entirely at this day on the *4 Hen. VII.* for which reason it will be necessary to explain it at large.

Of the statute
4 Hen. 7.
c. 24.

This act after reciting the last clause in the statute *de finibus levatis*, proceeds thus—"The king our sovereign lord considereth that fines ought to be of the greatest strength to avoid strifes and debates, and to be a final end and conclusion: and of such effect were taken afore a statute made of non-claim, and now is used the contrary, to the univer-

"sal

“ sai trouble of the king’s subjects; will
 “ therefore it be ordained, &c.”

The first section which directs the proclamations to be made, has been already stated.

262. *Seet. 2.* “ And the said proclamations so had and made, the said fine to
 “ be a final end, and conclude, as well
 “ privies as strangers to the same, except
 “ women covert, other than be parties to
 “ the said fine, and every person then
 “ being within the age of 21 years, in prison, or out of this realm, or not of
 “ whole mind at the time of the said fine
 “ levied, not parties to such fine.”

We have seen that by the common law, a fine levied of an estate-tail, only operated as a discontinuance of it, and did not bar the issue from bringing their formedon. But in consequence of some ambiguous expressions in this statute, it was supposed to enable tenants in tail to bar their issue by a fine; estates tail however had continued so long, and were so much favoured by the nobility, on account of their not being forfeitable for treason, that the Judges were extremely cautious of putting so extensive a construction
 on

on it, especially as the statute *de donis conditionalibus* expressly declares that a fine levied of an estate-tail should be void.

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A case however arose in 19 *Hen. VIII.* in which this point came in question before all the Judges in *Serjeants' Inn*, a tenant in tail levied a fine and the five years passed in his life-time, he afterwards died, and the question was, Whether his issue should be barred by the fine. *Englesfeld, Shelley*, and *Coningby* contended, that the issue was not barred because he was neither privy nor party to the fine, for he claimed the land from the donor and not from the donee, although he must convey himself to the land by the father. On the other side *Fitzjames, Brudenell, Fitzherbert, Brooke* and *Moore*, were of opinion that the issue was barred, for the intention of the makers of the statute was that a fine should be a final end and conclude as well privies as strangers, and that the third saving only extended to strangers but not to privies.

Bro. Ab. tit.
Fine, pl. 1.
Dyer 3. a.
1 Inst. 121.
a. n. 1.
4 Reeves
334.

263. This determination of the Judges seems not to have been entirely approved of, for in 32 *Hen. VIII.* a statute was made reciting that doubts had arisen respecting the

Q. 264. 26.
32 Hen. 8.

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32 Hen. 8.
c. 36. f. 1.

the validity of the stat. 4 Hen. VII. in
barring the issue in tail; and enacting,
“ That all and singular fines, as well
“ heretofore levied, as hereafter to be le-
“ vied, with proclamations according to
“ the statute, by any person or persons of
“ full age of one and twenty years of any
“ manors, lands, tenements or heredita-
“ ments before the time of the said fine
“ levied, in any wise intailed to the person
“ or persons so levying the said fine, or to
“ any of the ancestors of the same person
“ or persons in possession, reversion, re-
“ mainder, or in use, shall be, imme-
“ diately after the same fine levied, in-
“ grossed, and proclamations made, ad-
“ judged, accepted, deemed and taken,
“ to all intents and purposes, a sufficient
“ bar and discharge for ever against the
“ said person and persons, and their heirs,
“ claiming the said lands, tenements, and
“ hereditaments, or any parcel thereof,
“ only by force of such intail, and against
“ all other persons claiming the same or
“ any parcel thereof, only to their use, or
“ to the use of any manner of heir of the
“ bodies of them, any ambiguity, doubt,
“ or contrariety of opinion arisen or grown
“ upon

“ upon the said statute to the contrary
“ notwithstanding.”

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264. The statute 32 *Hen. VIII.* having been professedly made for the purpose of explaining the statute 4 *Hen. VII.* they must be considered as forming one law. The doctrine established by them is, that a fine with proclamations shall bar all privies and strangers, and when levied of any manors, lands, tenements or hereditaments intailed to the person levying such fine, or to any of his ancestors, shall bar the said persons and their heirs claiming by force of such intail.

*Operation of
these statutes
in law.
Estate tail.*

265. The term by which the issue in tail is described in the statute 4 *Hen. VII.* is that of privy, which has various significations in law; it sometimes means that connection which arises between persons who have entered into a mutual contract with each other, as between donor and donee, lessor and lessee; or else it signifies a relationship of blood, as between ancestor and heir. But in consequence of the statute 32 *Hen. VIII.* it has been determined that by the word privies are meant those persons who are not only privies in blood

1 *Inq.* 271.

a.

8 *Rep.* 42. b.

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blood to the persons who levy the fine, but also privies in estate and title to the land whereof the fine is levied, that is, those who must necessarily convey their descent through the cognizor before they can make out their title to the estate, which comprehends the issue in tail; and a person who is privy within the intention of the 4 Hen. VII. is an heir in tail within the intention of the 32 Hen. VIII. *et sic e converso*.

Shep. Tou.
21.

266. Thus if a tenant in tail in possession levies a fine with proclamations, it will be an effectual bar to all his issue; for they are privy to him both in blood and estate, and can only make a title to the estate-tail as his sons.

Dyer 351. b.

267. So where husband and wife were tenants in special tail, and the husband alone levied a fine, it was determined in 18 Eliz. and also in 10 Ja. 1. that it was a good bar to all their issue; for in making out their title they must necessarily shew themselves to be heirs to the father as well as to the mother, and therefore they are privies both in blood and estate to the cognizor of the fine.

Beaumont's
case,
9 Rep. 138.

268. Sir

268. Sir *Edward Coke* says, that if lands were given to an elder son and the heirs of his body, remainder to his father and the heirs of his body, and after the father's death, the eldest son had levied a fine with proclamations, and died without issue; the second son would have been barred by the fine, because the remainder which was limited to the father and the heirs of his body, having descended on the eldest son, the second son in making out his title to this remainder, must convey his descent through his eldest brother, by which means he would become a privy to him both in blood and estate.

269. The privy must be both in blood and estate, for privy in blood only will not be sufficient; and therefore if lands be given to a man and the heirs females of his body, who has a son and a daughter, and the son levies a fine and dies without issue, it will be no bar to the daughter; for although she is privy in blood to her brother, yet she is not privy in estate or title to him, as she can make her title to the estate without conveying her descent through him, or even mentioning him.

Shep. Tou.
21.

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Hob. 333.

270. It follows from the same principle, that if a tenant in tail has issue a daughter who levies a fine, and afterwards a son is born, he will not be barred by his sister's fine, because he can make his title to the estate tail, as heir of the body of his father, without conveying his descent through his sister.

271. It is not necessary that a tenant in tail should be in the actual possession of the estate tail, in order to be capable of barring his issue by fine; for the statute 4 Hen. 7. has expressly excluded parties and privies to a fine from averring *quod partes finis nihil habuerunt*, and the statute 32 Hen. 8. makes a fine levied of any lands intailed to the person so levying the same, or to any of his ancestors, a sufficient bar against such person and his heirs. A fine therefore with proclamations duly levied by the person who has the right of an intail in him, will be a good bar to his issue, although at the time when the fine was levied, he had never entered on the estate tail, or had only an estate tail in remainder, or had even made a feoffment, or any other conveyance of it.

272. Ed-

272. *Edward Lord Zouch* brought a for-
medon in the descender for a moiety of a
manor against one *Bamfield*, who pleaded in
bar that *John*, great-grandfather of the de-
mandant, levied a fine *sur cognizance de droit*
come ceo, with proclamations of the said moi-
ety, which was granted and rendered by the
same fine to the said *John* and his heirs,
whose estates the tenant had. Lord *Zouch*
replied, that at the time when the fine was
levied, and at all times after, the said *Bam-*
field was seised of the land in his demesne
as of fee. And on solemn argument it was
determined by all the judges, that the de-
mandant being heir in tail to the person who
levied the fine, could not aver the continu-
ance of the land in a stranger, nor that *par-*
tes finis nihil habuerunt, because the statutes
4 *Hen.* 7. & 32 *Hen.* 8. bound the estate
tail, although the person who levied the
fine was not then in possession of the estate
tail, which Sir *Edward Coke* observes was
the first determination on this point.

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Zouch v.
Bamfield,
3 Rep. 83.
1 Leon. 75.

273. A fine levied by a tenant in tail in re-
mainder, expectant on an estate for life, or
an estate tail, will be a good bar to the issue
of the person who levies the fine.

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Case of fines.
3 Rep. 84.
Jenk. 274.

A. being tenant for life remainder to *B.* in tail reversion to *B.* and his heirs, *B.* levied a fine with proclamations of the estate tail, during the life of the tenant for life : and it was adjudged to be a good bar to the estate tail under the words of the statute 32 *Hen.* 8.

3 Rep. 90. a.

274. If a tenant in tail makes a feoffment of the estate tail, and afterwards levies a fine of it, his issue will be thereby barred.

Hunt v. King.
Cro. Eliz.
610.

William King, the grandfather, being tenant in tail, enfeoffed *Richard King*, the father, in fee ; and afterwards *William King* disseised him, and levied a fine with proclamations to one *Hitchcock*. The father entered, and the cognizee of the fine entered on him : after the death of the grandfather and father, the son brought a formedon for the recovery of the land, to which this fine was pleaded in bar : the demandant pleaded the entry of his father, and judgment was given for him. A writ of error was brought, and error assigned in matter of law, that this fine was a good bar to the issue in tail by the statute 32 *Hen.* 8. for it was not to be compared to a fine at common law, nor to fines levied by other persons,

persons, because in this case it was sufficient that the fine was levied by the person who had the right of the estate tail in him, or to whom the land was intailed, although none of the parties to the fine had any estate of freehold in possession, remainder or reversion in the land whereof it was levied, as it was adjudged in the case of *Zouch v. Bamfield*. The Court being of this opinion the judgment was reversed.

Ante f. 271

275. Although a tenant in tail be disseised of the estate tail, yet if during the disseisin he levies a fine to a stranger, it will bar his issue, who will not be allowed to plead, that his ancestor was not seised of the estate tail when he levied the fine.

3 Rep. 90. a.
Jenk. 275.

276. In case of a lineal descent, the issue in tail may be barred by the fine of his ancestor, although at the time of levying the fine the ancestor had only a possibility of an estate tail, which never took effect, because the issue in making his title, must convey his descent through such ancestor, which makes him a privy to him.

Lands were given to A. and his wife in special tail; A. died, leaving issue a son,
N 3 who

Archer's case
3 Rep. 90. a.
Hob. 333.

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who disseised his mother, and levied a fine with proclamations. It was resolved by all the judges, that this fine was a good bar to the issue of the son, although the son, at the time when he levied the fine, had only a possibility of an estate tail, his mother being then alive; for the statute 32 *Hen. 8.* ought to be expounded according to the letter of it, and as the land was intailed to the ancestor of the person who levied the fine, although such ancestor was alive, so that no estate or right had descended on the person who levied the fine which he could pass or extinguish, yet as the statute says—"intailed to the person so levying the same, or to any of his ancestors," in the disjunctive, it was adjudged that the fine did bar the right which afterwards descended to him, not only as to himself, but also as to all his issue.

277. This principle was carried much further in the following case:

Grant's case,
cited 10 Rep.
50. a.

William Grant devised his lands to *John Grant*, when he should attain the age of twenty five years, to hold to him and the heirs of his body. *John Grant*, the devisee, after he had attained the age of 21 years,
but

but before he was 25, levied a fine of the lands thus devised; and the question was, whether it should bar his issue. It was resolved that the estate tail was barred by this fine, although *John Grant* when he levied it had but a bare possibility of an estate tail. Sir *Edward Coke* says that no judgment was given: but *Croke* and *Leonard*, who have reported this case by the name of *Johnson* and *Bellamy*, say that judgment was given, that the estate tail was barred by the fine. And in Sir *Thomas Raymond's* Reports, 149. it is said, that although the estate was not barred by the 4 Hen. 7. it was well barred by the 32 Hen. 8. in consequence of these words, "All fines, levied by any person or persons, &c. of any manors, &c. before the time of the said fine levied in any wife entailed to the person or persons so levying the same fine, or to any of the ancestors of the same person or persons,"

Cro. Eliz.

122.

2 Leon. 36.

278. In the case of a collateral descent, a fine levied by a person who was never seised of the estate tail, and on whom it never descended, but who had only a possibility of an estate tail, is no bar to a collateral heir in tail, of the person who levied

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the fine ; because in making his title to the estate tail, he need not convey himself through him, so that he is not a privy to him.

Mackwilliam's case,
Hob. 332.
Sir W. Jones,
31. S. C. by
the name of
Godfrey v.
Wade.

A husband made a feoffment to the use of himself and his wife, and the heirs male of their two bodies, remainder to the heirs male of the body of the husband, remainder to the heirs of their two bodies, remainder in fee to the husband. The husband and wife had issue a son and a daughter, the husband died ; the son made a lease to commence after the death of his mother, then levied a fine with proclamations to the use of himself in fee, and died without issue in the life-time of his mother. The question was, whether this lease was good against the daughter ? It should previously be observed, that the estate tail limited to the husband and wife, and the heirs male of their bodies vested wholly in the wife after the death of her husband, although she was within the statute 11 Hen. 7. c. 20. and the remainder to the heirs male of the body of the father was in the son at the time when he levied the fine ; but these estates became extinct when the mother and son died, so that the lease in question could

Ante f. 198.

could only be derived out of the remainder to the heirs of the bodies of the husband and wife, to which both the son and the daughter were inheritable. It was determined by Lord Chief Justice *Hobart*, *Hutton* and *Jones*, against the opinion of *Winch*, that although in a lineal descent the issue in tail were barred by the fine of their ancestor, notwithstanding such ancestor had but a possibility of an estate tail when he levied the fine; yet in a collateral descent the case was very different, as it was not necessary that the issue in tail should make mention of every collateral issue inheritable before him, as in a lineal one; and that in the present case, as the estate tail never descended on the son, his fine could be no bar to his sister, who was not privy to him, because she could make her title to the estate tail without conveying her descent through him, or even mentioning him in her pedigree. Judgment was therefore given that the lease was void as to the sister, but it was observed that if the estate tail had descended on the son, his fine would then have barred his sister, because in that case she must have conveyed her descent through him, in order to make out her

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her title to the estate tail, by which means she would have been a privy to him.

Bradstock v.
Scovell,
Cro.Car.434.

279. So where an eldest son levied a fine of an estate tail, which was then vested in his mother, and died in the life-time of his mother, by which means the estate tail never descended on him. It was adjudged in the Common Pleas, by three Judges against one, that this fine did not bar the second brother. And upon a writ of error, all the Judges of the King's Bench were of the same opinion, because as the estate tail never vested in the elder brother, the younger brother was not a privy to him.

Jenk. 275.

280. If a fine be levied by a stranger to a tenant in tail, and the tenant in tail grants and renders his estate to the stranger, such a fine will bar the issue in tail.

281. A tenant in tail of a rent-charge may bar it, by levying a fine of the lands out of which the rent issues.

Heliot v.
Saunders.
Cro.Jac.700.
1 Vez. 391.

Upon demurrer the case was thus: a person who was tenant in tail of a rent-charge out of the manor of *Kingbury* granted

granted by Sir *Ambrose Cave*, levied a fine of the manor to Sir *Ambrose Cave* and his heirs, and this fine was pleaded in bar of an avowry for this rent by the heir in tail. The fine was levied of the rent *per nomen manerii*, and an averment was made that the fine was levied by agreement of the parties with an intent to bar the rent. The defendant pleaded, non-comprised, which being demurred to, and argued several times, it was held by *Hobart* Chief Justice, and *Harvey*, that the rent was barred by the fine, because the fine being levied of the land, passed the rent inclusively, it being directed by the agreement of the parties.

282. As a fine may be levied of an advowson in gross, so a tenant in tail of an advowson in gross, may bar his issue by a fine levied of it according to the statute 4 *Hen. VII.* It is however said in *Plowden*, that if a tenant in tail of an advowson grants or renders to another by fine, the nomination of a clerk to the advowson, this will not bind the issue, because the right of nomination is a thing distinct from the advowson, and not intailed; but modern writers have thought differently on this

Watf. Comp.
Incum. 84.
Plowd. 435.

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this subject, on the principle that the presentation and nomination are in effect the same thing, being the fruit and full profit of the patronage. But if a tenant in tail of an advowson grants by fine the nomination of a clerk to one and his heirs, so that when the church becomes void, the grantor and his heirs may nominate a clerk to the tenant in tail and his heirs, and that he or they shall present the clerk so nominated to the ordinary; such a fine will not bind the issue in tail, because there the nomination and presentation are distinguished, so that the fine is not levied of the thing intailed.

infra.

283. If a person is tenant in tail of a trust-estate and levies a fine of it, such fine will have as extensive an operation in barring his issue, as if he had been seised of the legal estate.

Smith v.
Stapleton,
Plowd. 430.

284. As a tenant in tail may convey his whole estate by fine, so he may create any lesser estate out of it, which will likewise bind his issue after his death.

Shep. T. 26.

285. If the issue in tail levies a fine in the life-time of his ancestor, who is then
seised

seised of the estate-tail, the ancestor himself may afterwards levy a fine, and thereby bar his issue, and also the person to whom the issue levied the fine. So that in all cases of this kind, it is understood that the tenant in tail dies without barring the estate tail, by which means it descends upon the issue.

286. A tenant in tail being guilty of murder, levied a fine before conviction, and it was doubted whether it should bar the issue for the lord's benefit. The Court inclined to think that it should, but no judgment was given.

1 Will. Rep: P. 2. 220.

287. Where the king is tenant in tail he may by a fine levied on a grant and render, bar his estate-tail, because it being determined in Lord *Berkley's* case, that the king was bound by the statute *de donis*, it was but reasonable his majesty should take advantage of those statutes, which enable tenants in tail to bar their estates.

7 Rep. 32. a. Plowd. 227.

288. A fine *sur concessit* will bar an estate tail as long as it continues in force, and therefore any estate created by a fine of that

Earl of Rutland's case, Cro. Jac. 40. Jenk. Cent. 321.

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that kind will be good against the issue in tail.

289. Although a fine levied by a tenant in tail may be defeated by a person claiming some particular estate in the lands of which the fine is levied, yet it will still continue to be a good bar to the issue in tail.

1 And. 43.
3 Rep. 91. a.
Com. Rep.
216.

A tenant in tail discontinued in fee, afterwards disseised the discontinuee and levied a fine with proclamations; the discontinuee entered on the land, and avoided the estate, which passed by the fine as to himself. The question was, Whether the heir in tail was remitted or not, and the Judges were unanimous, that the heir in tail was not remitted, but was barred by the statute 32 *Hen. VIII.* altho' the estate which passed by the fine was avoided. The same point was determined in the case of *Hunt v. King*, which was stated in the preceding part of this chapter.

f. 274.

290. Although no fine is a bar to an estate-tail, but a fine with proclamations levied pursuant to the statute 4 *Hen. VII.* yet as soon as a fine is levied, and before

all the proclamations are past, it is a good bar to an estate-tail, provided the proclamations are duly made, and the issue in tail cannot save his right by entering before all the proclamations are made.

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This point was formerly much doubted, and in the case of *Smith and Stapleton*, 15 *Eliz.* it was contended by the counsel, that in consequence of the words in the statute 4 *Hen. VII.* "and the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers, &c." And also the words in the statute 32 *Hen. VIII.* "after the same fine levied, ingrossed, and proclamations made, &c." A fine was no bar to the issue in tail, if the ancestor died before all the proclamations were made: and *Brooke* seems to have been of the same opinion; the contrary, however, was determined in the following case:

Plowd. 434.

Bro. Ab. tit. Fine, 109.

291. Sir *George Blount* being tenant in tail of several manors, and having issue a daughter, levied a fine and soon afterwards died. The daughter immediately brought a formedon for the recovery of the estate-tail, pending which, all the proclamations were

Purflow's case, cited 3 Rep. 90.

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were made. It was unanimously determined, that the daughter was barred by this fine, although her ancestor died, and she commenced her action, before all the proclamations were made. Sir *Edward Coke* makes four observations on this case.

1st. That although, after a fine is levied, a right to an estate-tail descends to the issue, yet as soon as the proclamations are made, the right which thus descended is barred by the fine.

2d. Although a formedon is brought and pursued, yet, if the proclamations are all afterwards duly made, the fine will then be a good bar.

3d. When tenant in tail levies a fine, and dies before all the proclamations are made, the issue in tail is not within any of the savings of the 4 *Hen. VII.* for, if he were, then the bringing his formedon before all the proclamations were made, would avoid the fine.

4th. That the proclamations serve no other purpose but that of distinguishing a
fine

fine levied pursuant to the statute 4 *Hen.* VII. from a fine at common law.

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292. So where a tenant in tail levied a fine and died before all the proclamations were made, leaving a son, who was beyond sea, who returned after all the proclamations were made, and claimed the land. It was resolved by all the Judges, that although a right of entail descended to the son on the death of his father, in consequence of his dying before all the proclamations were made; yet, when all the proclamations passed, the right which descended to him was for ever barred, and the issue could not have saved it by any claim.

Case of fines,
3 Rep. 84.

293. We have seen that fines may be levied in courts of ancient demesne, and other inferior courts; but they have only the operation of fines at common law which is to create a discontinuance, when levied of an estate-tail, and do not bar the issue from bringing a formedon; for no fine unless it is levied with proclamations, pursuant to the statute 4 *Hen.* VII. has the effect of barring an estate-tail, without a particular custom.

Ante c. 133.

Com. Rep.
124.

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294. There is one species of estate-tail which is protected from the operation of the statutes 4 *Hen.* VII. and 32 *Hen.* VIII. that is, an estate-tail given or procured to be given by the crown as a reward of services, where the remainder or reversion is vested in the crown; of which notice will be taken in a subsequent chapter.

1 *Inst.* 223. b.
note 1.

1 *Vent.* 321.

2 *Vern.* 233.

295. The privilege of levying a fine pursuant to those statutes, is an incident so inseparably annexed to an estate tail, that any condition or proviso restraining or prohibiting it, is held to be repugnant to the nature of the estate, and therefore void. But a tenant in tail may be restrained from levying a fine at common law, because that is a tortious act, and only operates as a discontinuance to the issue.

296. Before we quit this subject it may be proper to observe, that the operation of a fine is merely to bar the estate tail, but not the remainders or reversion which depend upon it: for a fine levied by a tenant in tail in possession, only discontinues the estate tail, and gives the cognizee a base fee, that is, an estate to him and his heirs, as long as the tenant in tail has heirs of his body;

body; but does not bar the rights of the persons in remainder or reversion.

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297. Where the tenant in tail has the immediate reversion in fee in himself, he may make a good title by fine only; for in that case the operation of the fine will be to merge the estate tail, and bring the reversion in fee into immediate possession: it being determined that a fine takes away the protection given to estates tail by the statute *de donis*, and they then, like all other particular estates, become subject to merger and extinguishment, when united with the absolute fee.

1 Show. 370.
4 Mod. 1.

This method, however, of barring an estate tail, is attended with one considerable inconvenience, which will be mentioned in a subsequent chapter.

Infra.

298. There are two clauses in the statute 32 Hen. 8. c. 36. by which it is enacted, That it shall not extend to any fine levied of any lordships, manors, &c. the owners whereof, by any express words contained in any special act of Parliament made since the 4 Hen. 7. are restrained from alienation; nor to any manors, lands, tenements,

S. 3 & 4.

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&c. then in suit, demand, or variance in any of the King's Courts, or whereof any charters, evidences, or muniments, were then in demand in the Court of Chancery, &c. but all such fines should have the same force and effect as if that statute had not been made.

CHAPTER X.

Of the Force and Effect of a Fine in
barring particular Persons, Estates,
and Interests.

299. **T**HE object of the statute 4 *Hen.*
7. was not confined to the ena-
bling tenants in tail to bar their issue, it
was also intended to secure those who were
in possession of land against all dormant
claims; the words of the statute being so
extensive, that they comprehend almost all
persons, and almost every kind of estate or
interest in lands: and where a fine and non-
claim is pleaded, a court of law will not
enter into any discussion of the title until
that be accounted for.

Driver v.
Lawrence.
2 Black. Rep.
1259.

300. All those who are parties to a fine
are immediately barred, and have no time
allowed them to claim, even though they
labour under disabilities, except in the case
of infancy.

Parties.

Vide ante f.
186.

301. Lay corporations, who have an
absolute estate in their possessions, and a

Lay corpora-
tions.

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power of alienation, may be barred by a fine and non-claim.

Croft v.
Howell.
Plowd. 536.

The cooks of *London*, who were incorporated by *Edward 4.* bargained and sold a part of their lands in fee; the bargainee entered, and levied a fine with proclamations, and five years passed. Afterwards the bargain and sale proved to be void, on account of a misnomer in the corporation; and it became a question, whether the corporation was bound by the fine and non-claim. It was determined that the corporation was barred by the fine, because the statute 4 *Hen. 7.* was made for the public good, and to settle and quiet men's inheritances: that therefore the words of it ought to be construed in the most extensive sense, for the benefit of those who were in possession of lands, and for barring the rights of all persons who were remiss in making their claims: so that although the words of the statute only extended to natural persons and their heirs, and no mention was made of any corporation or successors; yet it was the intention of the legislature, that it should extend to such corporations as had in themselves an absolute estate and power of alienation.

Eccle-

Ecclesiastical corporations, however, are not barred by a fine and non-claim, as will be shewn hereafter.

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Infra ch. 13.

302. By the common law, a married woman could not, by joining with her husband in any deed or conveyance whatever, bar herself or those claiming under her of any estate whereof she was seised in her own right, or of that portion of her husband's real property, which the law has provided for her support in case she survives him (a).

Married women.

This rule probably arose from that principle of law, that the legal existence of a woman is suspended during the marriage, or, at least is incorporated or consolidated into that of her husband, or else from a fear that her husband should use any compulsion for the purpose of forcing his wife to part with her rights in his favour.

1 Comm. 442.

(a) There are two instances in *Mallox Formulæ Anglicanum*, No. 148 & 319. of feoffments, which are expressed to be made with the assent of the feoffor's wife. And Mr. Reeves (*Hist. of the English Law*, vol. 1. p. 91.) supposes that the wife's claim of dower might, in those days, be barred by such assent, because feoffments were then made publicly in Court.

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303. But although a married woman was never bound by any deed or conveyance executed by her during the coverture, yet if an action was brought against a husband and wife for the recovery of any lands, whether the property of the husband, or of the wife, and judgment was given against them, the wife was barred.

2 Inst. 342.

1 Reeves 427.

9 Vin. Ab.

pa. 244.

Thus it appears that until the statute of *Westm. 2.* even a judgment by default in a possessory action against a husband and wife, for the wife's freehold, was so far binding on her, that after her husband's death, she could only recover her estate, by bringing a writ of right. Now a fine being an accommodation of a suit, and a concord being deemed to have the same force and effect as a judgment in a real action, it follows that a married woman must have been as effectually bound by a fine as by a judgment in an adversary suit. Nor was it thought necessary to give the wife a power of claiming lands, whereof she and her husband had levied a fine, because in that case she must have assented to it; whereas the husband might have put in a feint plea, or let judgment go against him by default,

default, without the consent or even knowledge of his wife.

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Mr. *Hargrave*, to whose learned note on fines I am indebted for the preceding observations, has very properly suggested, that the common notion of a fine's owing its effect in barring married women, to their secret examination by the judges or commissioners, is incorrect. This remark is fully confirmed by a passage in *Glanville*, from which it appears that a married woman might appoint her husband as her attorney to levy a fine for her (*a*), in which case it is highly improbable that she should have been examined: and from which it may be concluded, that the private examination of a married woman was not a necessary circumstance at common law, and was possibly first prescribed by the statute *de modo levandi fines*.

1 Inst. 121. a.
note 1.

(a) "*Potest autem pater ita loco suo filium pro se ponere, et vice versa, extraneus quoque extraneum, uxor quoque maritum, cum quis itaque maritus positus loco uxoris fuerit in placito de maritagio, vel de dote ipsius uxoris per judicium sive per concordiam, &c.*" *Glanville*, lib. 2. c. 3. Vide also an authentic record, ante p. 108.

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2 Inst. 673.
Keilw. 4. a.

If a fine derived its efficacy in barring married women, from the circumstance of their private examination, then that form might easily have been added to any other conveyance; but, by the common law, a bargain and sale by a husband, on which the wife is privately examined, does not bind her after the coverture is determined.

Bohun's Priv.
Lond. Bro.
Ab. tit. Custom, pl. 39.
Idem tit. Fait.
inroll. pl. 15.
34, 35 Hen.
8. c. 22.
Hob. 225.

It is however observable, that by the custom of *London* and several other cities, a married woman may bar herself by a deed inrolled, in which she is privately examined; and this custom was confirmed in the reign of *Hen. 8.* by a positive statute.

304. But whatever were the principles upon which this doctrine was originally founded, it is now fully settled, that a married woman by joining her husband in levying a fine, may bar herself and her heirs of all her estate and interest in any lands, whereof her husband is seised in her right, notwithstanding the stat. 32 *Hen. 8. c. 28.* And where a fine is levied by a husband and wife, of lands which are the property of the wife, the whole estate passes from the wife,

wife, and the cognizee is in by her only ; so that if the fine is afterwards reversed, the whole estate becomes again vested in the wife (a).

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2 Rep. 57. b.
Id. 77. b.

305. Where a fine is levied by a husband and wife, of lands which are the estate of the wife, the warranty should be from the husband and wife and the heirs of the wife.

Roll. Abr.
tit. Fine,
(O. 3.)

306. A husband and wife joined in exchanging lands which were the estate of the wife, with a stranger for other lands, and the exchange was executed. The husband and wife aliened the lands taken in exchange, and levied a fine of them to the alienee. It was adjudged that the wife might enter on her own lands after the death of her husband, and that her joining in a fine of the lands taken in ex-

Anon.
1 Leon. 285.

(a) It is said *arguendo*, in Mr. Douglas's Reports, " That a husband is only named in a fine of his wife's estate for conformity ; for the fine is considered as the act of the wife, not of the husband, and the cognizee is in by her only, insomuch that if a wife levies a fine without the concurrence of her husband, and he does not enter during the coverture, it will bar her after his death." *Doug.* 44.

change,

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change, did not bar her from electing whether she should claim her own lands, or those taken in exchange.

307. A married woman may bind herself by a warranty in a fine *sur concessit*, and an action of covenant will lie against her upon such a warranty.

Wotton v.

Hale,

1 Mod. 290.

2 Saund.

180.

Thus, where a husband and wife levied a fine *sur concessit* to A. for 99 years if he should so long live, with a general warranty against all persons during the said term; the husband died, and it was determined that an action of covenant would lie against the wife upon the warranty.

Reason v.

Sacheverell,

1 Vern. 41.

308. As a married woman may by joining her husband in a fine make an absolute alienation of her estate, so she may also make a conditional one; and therefore if she and her husband mortgage her estate in this manner, it will bind her and her heirs.

Glauv. l. 11.

c. 5.

10 Rep. 49.

b.

309. It was formerly held that a married woman did not bar herself of her right to dower, by joining her husband in a fine; because until the death of the husband,

band, the wife had no right of action: but the law is now entirely altered in this respect, as it has been long established, that if a husband and wife join in levying a fine of the husband's estate, the wife is thereby barred from claiming her dower, out of the lands which are comprised in the fine; because she having nothing in those lands in her own right, her joining her husband in a fine of them, could be for no other purpose than that of barring her from claiming dower; but a fine levied by the husband alone does not bar his wife of dower.

310. A woman may also bar herself of her jointure, by joining her husband in levying a fine of it, provided it be made pursuant to the statute 27 *Hen. VIII.* and be a good bar of dower; because the wife by accepting such a jointure before marriage, barred herself of her right to dower, so that she can claim nothing after her husband's death but her jointure, which she herself concurred in destroying by the fine. But if a jointure be settled on a woman after marriage (in which case it is no bar of dower) and she joins her husband in levying a fine of it, this will not prevent

1 Inst. 36. b.

1 Inst. 36. b.

1 Bulst. 173.

1 Leon. 285.

Dyer 358.

pl. 49.

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vent her from claiming dower out of any other lands whereof her husband was seised during the coverture, because the jointure being no bar of dower, the wife had her election on her husband's death either to accept of the jointure, or to claim her dower, and therefore Sir *Edward Coke* says, that a fine levied of her jointure before her time of election, is no bar to her right of electing dower, when her time of election does come.

311. Notwithstanding these determinations, if it appears not to have been the intention of a husband and wife in levying a fine to bar the wife's jointure, it will not affect it in a Court of Equity.

Solly v.
Whitfield,
Rep. Temp.
Finch. 227.

S. P. Naylor
v. Baldwin,
Rep. in Cha.
8vo. v. 1.
131.

Thus where *A.* upon his marriage in consideration of 500*l.* portion, settled an annuity of 50*l.* on his wife to be issuing out of particular lands; and afterwards *A.* and his wife joined in levying a fine of those lands to a mortgagee, who had notice of the annuity, which was accepted in the mortgage. It was contended that the wife had by this means extinguished her right to the annuity. But it appearing that it was not the intention of the parties

to destroy this annuity, the Court decreed that it should not be affected by the fine.

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312. So where a jointure was settled on a woman issuing out of some houses in *London* which were burnt down; the woman joined her husband in a fine of the houses, to create a long term for raising money to rebuild them; and it was agreed that the woman should have her jointure out of the reserved rent of the houses. Adjudged that the fine did not affect this jointure.

Anonymous,
Skinner 238.
Brind v.
Brind,
1 Vern. 213.
Vide 4 Vin.
Ab. 68.

313. However, where a married woman joins her husband in a fine, it will not only bar her from claiming dower out of the lands comprised in the fine, but will also bar her of any particular interest in those lands.

A man on his marriage entered into a bond for 600*l.* to a trustee with a warrant of attorney to confess judgment thereon, to be defeazanced on the payment of 300*l.* to his wife if she should survive him: the wife afterwards joined her husband in a fine of all his lands. It

Goodrick v.
Shotbolt,
Prec. in Cha.
333.
Gilb. Rep.
18.

was

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was agreed that the fine not only barred the wife from claiming dower out of the lands, but also destroyed her interest in the judgment.

314. Every kind of fine with or without proclamations, and whether levied in the Court of Common Pleas or in an inferior Court will bar a married woman; for fines derive this effect from the principles of the common law, and not from any statute.

Trust estates.

Clifford v.

Ashley,

1 Cha. Ca.

268.

Salisbury v.

Bagot,

1 Cha. Ca.

278.

1 Freem.

311.

315. A fine is a good bar to a trust estate, as well as to a legal estate, because the *cestui que trust* has an equitable interest, and is therefore bound to pursue the proper remedies for securing it: and if this were not the case, the operation of a fine would be much less extensive than it is, as there are so many trust estates now always existing.

Thus, if *A.* is seised of the lands in trust for *B.* and *C.* enters on these lands and levies a fine of them with proclamations; if five years pass without any claim being made, this fine will be a good bar both to *A.* who had the legal estate, and to *B.* who was the *cestui que trust*.

316. But

316. But with respect to equitable titles there is a distinction; for where the equity charges the lands only, a fine and non-claim is a good bar, but where it charges the person only in respect of the land, it is then no bar.

Thus if a trustee levies a fine of the lands whereof he is seised in trust, to a person who has notice of the trust, or if a man purchases from a trustee, with notice, and levies a fine, the *cestui que trust* will not be barred, because the fine being levied to a person or by a person who has notice of the trust, the land will continue subject to the trust, and therefore the Court of Chancery will not permit the fine to be a bar; so that whenever a person is charged as claiming under a trustee, he must either set up an opposite title, and deny his claiming under the trustee, or else, if he does claim under a trustee, he must set forth that he paid a valuable consideration for the lands, and deny that he had any notice of the trust.

Gilb. Cha.
62.

317. If the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and

2 Atk. 631.

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will not affect the purchaser with notice, so as to make him a trustee for the person who had the right, because, (as Lord *Hardwicke* observes) this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine's being levied.

It should however be observed, that where a fine is levied by a trustee or a person who has notice of the trust, it is not void, nor is it set aside, but the person to whom the fine was levied without consideration, or with notice, becomes himself a trustee for the real owner.

Infra, ch. 14.

318. Having examined in what cases a *cestui que trust* may be barred of his trust estate by the fine of a stranger, it will also be necessary to inquire how far a fine levied by a *cestui que trust* himself, is a bar of his trust estate.

Year Book.
27 Hen. 8. 20.
Bro. Ab. tit.
Fine pl. 4.

Before the statute of uses, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern Chancellors

Chancellors have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may by a fine duly levied bar his issue as fully as if he had the legal estate: for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from executing the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

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1 Cha. Ca.
213.
Cafes temp.
Talbot 43.

319. A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

Basket v.
Peirce.
1 Vern. 226.
2 Ab. Eq 473.

320. We have seen that a copyholder cannot implead or be impleaded for his copyhold in the King's Courts, and therefore cannot levy a fine of it in the Court of Common Pleas: but notwithstanding this

Copyholds.
Ante f. 180.

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principle, a copyhold estate is considered as an interest within the statute 4 *Hen. 7.* and therefore may be barred by a fine, levied by the person who has the freehold of the land.

Co.Cop.f.55.

Thus if a copyholder be disseised, and the disseisor levies a fine with proclamations, both the lord of the manor and the copyholder will be barred, if they do not make their claim in due time.

321. So if a copyholder makes a feoffment in fee, and the feoffee levies a fine with proclamations, and five years pass without any claim, the lord of the manor will be barred.

Margaret
Podger's case
9 Rep. 104.

Thomas Wise being seised of the manor of *Hampenbridge*, in which there was a custom that certain lands within the said manor were demised and demisable, by copy of Court Roll, for one, two, or three lives, demised the premises in question to *John Podger*, and *Elizabeth* and *Mary* his daughters, for their lives. *John Podger* being so seised, *Thomas Wise*, the lord of the manor, by deed indented and inrolled, bargained and sold the said lands to *John Podger* and

his

his heirs, by force of which he became seised of the freehold and inheritance thereof; and being thus seised, *Thomas Wise* levied a fine of the same, to him and his heirs, with proclamations. Upon the death of *John Podger*, these lands descended to his son, and his daughter *Elizabeth* neglected to enter within the five years. It was unanimously resolved that lands held by copy of Court Roll were within the words and intent of the statute 4 *Hen. 7.* for the purview of the act is general, declaring a fine to conclude as well parties as strangers to the same; and the words of the saving being "such right, claim, and interest," extend to a copyhold estate.

322. There is a custom in most manors that a copyhold may be entailed, but even if a fine were allowed to be levied in the court of the manor whereof such copyhold is held, it will not bar such an intail, because it is not levied pursuant to the statute 4 *Hen. 7.* unless it is allowed by the custom to have that effect.

323. Terms for years may be barred by a fine and non-claim, if the lessees were or ever might have been in possession.

Terms for years.

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Saffyn's case,
5 Rep. 123.
Cro. Jac. 60.

Thus where a lease for years was made of certain lands, to begin after the determination of a lease then subsisting; the first term expired, the second lessee neglected to enter, and the person in reversion entered, made a feoffment, and levied a fine with proclamations of the lands. Five years passed without any claim being made by the second lessee, and the question was, Whether he was barred by the fine. It was resolved, that although a lessee for years had not himself such an estate as would enable him to levy a fine, yet it did not therefore follow that his interest should not be barred by a fine; that a term for years was within the statute 4 Hen. 7. being comprehended under the word *interest*, and as the object of that act was to prevent strifes and debates, it would not have that effect, if its operation did not extend to long terms for years, which are now so common.

Ischem v.
Morrice,
Cro. Car.
110.

324. This principle was carried so far, that where a person who had a long term for years, assigned it over to a trustee in trust for himself, then purchased the freehold and inheritance of the lands, and levied a fine: it was resolved that the term was

was barred, the assignee of it having suffered five years to pass without making any claim.

Mr. Justice *Ventris* has taken notice of this case, and observed, that the cognizor of the fine, who was also the purchaser of the freehold, did not know of the term, or that it was held in trust for him; so that if the fine had not barred it, he would have been cheated. But that where a term is assigned in trust for the person who is seised of the inheritance, and who is in possession, a fine levied by him will not destroy the term, because the owner of the inheritance is, in cases of that kind, tenant at will to his trustee; and this rule has ever since been adhered to: so that it is now a settled principle, that terms for years, which are kept on foot by purchasers, for the purpose of protecting the inheritance, are not barred by a fine, otherwise fines would frequently weaken the interest of purchasers, instead of adding to their security.

1 Lev. 272.
1 Vent. 82.
Sid. 460.
3 Keb. 564.
Duke of
Norfolk's
case, 3 Ch.
Ca. 1.

325. A term which is vested in trustees on any particular trust (except that of protecting the inheritance) may also be barred by a fine and non-claim.

P 4

Thus,

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Hanmer v.
Eyton,
Comb. 67.
1 Cha. Rep.
27. 33.

Thus, where *A.* had a term for years vested in him for securing children's portions, *B.* being in possession, levied a fine, and five years passed without any claim being made. It was resolved by the Court of King's Bench, that, admitting the term was in trust, it was barred by the fine.

326. If a person makes a lease for years, and still continues in possession, he is considered as tenant at will to the lessee for years; and if the lessor, being thus in possession, levies a fine, it will be no bar to the term for years, because the possession of the tenant at will being the possession of the person in remainder, his interest is not divested; and it will be shewn in a subsequent part of this work, that no estate is barred by a fine, unless it be divested out of the real owner.

Focus v. Salisbury, Hard.
400. 3 Bac.
Abr. 418.

Thus where a person who was seised in fee, for the continuance of his estate in his name and family, made a lease for 500 years in trust that he himself should receive the profits during his life, and that afterwards his brother should receive them. Some time after, the lessor being in possession according to the trust, covenanted with
other

other trustees for the same considerations, to stand seised of those lands to the use of himself for life, remainder to the use of his brother, &c. And that the said lease, and all other estates made or to be made by him, should be and enure to the same uses, and then levied a fine. A question arose, whether the term for 500 years was barred by the fine and non-claim. Sir *Matthew Hale* observed, that nothing had been done in this case whereby the estate of the lessee was divested or displaced; for the lessor continuing in possession, by permission of the lessees, as must be presumed, he was only tenant at will to the lessees, and therefore his fine had no operation: besides there was a privity between the lessor and lessee, which prevented the fine from operating as a bar to the term.

No judgment appears to have been given in this case; but in another which was exactly similar, it was determined that a fine was no bar to a term of this kind.

Corbett v. Stone, Sir T. Raym. 150.

327. If a person who has made a lease to trustees, and has still continued in possession, makes another lease of the same lands, and levies a fine to confirm it, the first

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first lease will be devested by the second; so that it will then be barred by the fine and non-claim.

Freeman v.
Barnes,
1 Vent. 55.
1 Lev. p. 1.
270. 3 Bac.
Ab. 449.

The Marquis of *Winchester* made a lease for a hundred years, in trust to attend the inheritance, and the lessee entered. The Marquis afterwards made a lease for fifty-four years, and, to confirm it, levied a fine with proclamations. The lessee for 54 years entered; and the lessee for 100 years being out of possession, assigned his term to the plaintiff.

The question was, whether the fine and non-claim barred the term of 100 years?

It was adjudged that the Marquis, when he entered after he had made the lease for 100 years, was tenant at will; but that he had devested that term by making the subsequent lease for 54 years; for it was in the power of the Marquis either to devest the term of 100 years or not, and he had made his election by levying the fine; so that the term for 100 years being thus devested by the lease for 54 years, was barred by the fine. But in this case all the Judges agreed, that terms for years, kept on foot
by

by purchasers to protect their estates, should not be barred by a fine and non-claim.

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328. Estates held by statute merchant, statute staple, and elegit, are comprehended within the statute 4 Hen. 7. and may therefore be barred by a fine and non-claim, provided the lands be extended.

Estates held by statute merchant, &c.
2 Inst. 517.
5 Rep. 124.

Thus upon a trial at bar, the Court delivered it as law to the jury, that where lands were actually extended on a writ of elegit, the tenant by elegit might be barred by a fine and non-claim; and that if an inquisition upon an elegit be found, the party has the possession before entry, and may bring an ejectment or action of trespass.

Ognell v. Lord Arlington, 1 Mod. 217.

So in the case of *Deighton v. Grenville*, which will be stated in the next chapter, all the Judges agreed, that although the cognizees of statutes merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine.

329. The estate of a devisee may be barred by a fine and non-claim, if the devisee has not entered.

Devisees.

Thus

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Hulm v.
Heylock,
Cro. Car.
200.

Thus where *John Metcalf* devised lands to *John Gallant*, an infant of the age of three years, in fee. The son and heir of *John Metcalf* entered on the lands, and levied a fine of them. *John Gallant* the infant died before he attained his full age, leaving a sister, who was then married. The Court were of opinion that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

Executors to whom lands are given for payment of debts.
5 Rep. 124.a.

330. Executors to whom lands are devised for payment of debts, may also be barred by a fine levied of the lands thus devised, if they do not make their claim in due time.

A title of entry for a condition broken.

331. A title of entry for a condition broken, may be barred by a fine levied by the grantee or devisee of the conditional estate.

Mayor of
London v.
Alsford, Cro.
Car. 575.
1 W. Jones,
452.

Thus, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a school-master, &c. and, on non-performance of the trusts, the lands were devised over to other

other persons. The trustees neglected to perform the trusts, and levied a fine of the lands. It was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

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332. A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate: as if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee or to any other person, the condition will be thereby discharged for ever. But if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

Shep. Ten.
154.

Cromwell's
case, 2 Rep.
69.

333. It seems that a right or title of entry on any other account may also be barred by a fine.

Thus, where *Humphrey Mackworth* was seised to him and his heirs, provided that if 100*l.* was not paid within three months after

Thomasin v.
Mackworth,
Carter 75.

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after the birth of a child, the trustees should enter. The money was not paid; so that the estate of *Humphrey* being with a *quousque*, ceased, but the trustees did not enter. *Humphrey* conveyed away the lands by lease and release, and levied a fine; after which five years passed. Lord Chief Justice *Bridgeman* delivered the opinion of the Court, that the entry of the trustees was barred by the fine.

A power appendant, or in gross.

1 Inst. 237. a.
3 Rep. 83. a.

334. A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over those lands. Besides a power appendant or in gross, being part of the old dominion, is considered as an interest which may be released.

Digges's case, 1 Rep. 173.

Christopher Digges being seised in fee, covenanted to stand seised to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented

indented and inrolled. *Christopher Digges* revoked the uses, but, before the deed of revocation was inrolled, he levied a fine. It was resolved that the fine being levied before the inrollment of the deed of revocation, until which time the revocation is imperfect, had destroyed the power.

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335. A power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the residue.

1 Inf. 215. 2.
Shep. T. 301.

336. If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

Sir *J. Williams* being seised in fee, made a voluntary settlement to the use of himself for life, remainder to his brother Sir *M. Williams* in tail, reserving to himself a power of revocation. Some time afterwards, Sir *J. Williams* levied a fine, and by a deed made between him, his brother

Sir

Herring 7.
Brown,
2 Show. 181.
1 Vent. 368.
Carrh. 22.
Comb. 11.
Skin. 181.
1 Freem. 486.

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Sir *M. Williams* and others, bearing date a month after the fine was levied, reciting the fine, it was declared, that at the time of levying the said fine, the agreement of all the parties to the deed was, that it should enure to the use of Sir *J. Williams* and his heirs.

It was objected that Sir *J. Williams* by levying this fine, without any precedent declaration of the uses to which it should enure, had destroyed his power of revocation, and forfeited his estate for life; for the deed being subsequent to the fine, was ineffectual, because there was an intermediate time between the levying of the fine and the execution of the deed, in which the forfeiture attached, and the power was destroyed; so that no subsequent act could purge the forfeiture which once attached, nor revive the power which was destroyed: for these reasons, and upon the authority of *Digger's* case, it was adjudged in the Court of King's Bench, that Sir *J. Williams* had, by levying the fine, destroyed his power of revocation, and therefore that the subsequent declaration of uses was void.

On

On a writ of error to the Exchequer Chamber, this judgment was reversed by the opinion of six Judges against two; it being determined that the fine and declaration of uses were to be considered as one and the same conveyance, and operated as an execution, and not as an extinguishment of the power. It was agreed that a fine alone, without a deed to declare the uses of it, would have extinguished the power, but that it was otherwise where there was a deed declaring what the intention of the parties was when the fine was levied; and although the date of the deed was subsequent to that of the fine, (for no other reason, perhaps, but because the fine was levied in the vacation, and was dated as of the preceding term) still it was possible that the deed was executed at the time the fine was acknowledged; so that it would be unreasonable to make a forfeiture or extinguishment of a right merely by relation, which is but a fiction of law.

This doctrine has been confirmed by the Court of King's Bench, in the case of *Doe*, on the demise of *Odiarne v. Whitehead*, which will be stated in a subsequent chapter: so that now whenever a fine is

Douglas 45.
S. P.

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levied, and a declaration of the uses of it is afterwards executed, the fine and declaration of uses will be considered as one assurance.

*But not a
power collate-
ral to the land.*

1 Inst. 237. a.

337. A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine, levied by the person to whom such a power is reserved; because it is considered but as a bare and naked authority, which cannot be released or divested.

1 Rep. 174. a.

Thus it is said by Lord Chief Justice *Popham*, in *Digges's* case, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses; *B.* could not in that case revoke his power, nor extinguish or destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

338. It follows from the same principles that a collateral power cannot be barred by the fine of a stranger.

Thus

Thus where a person by a proviso in his marriage-settlement gave his wife a power to dispose of 100 *l.* to such persons as she should appoint, to be paid within one year after his decease; and in default of payment, one *John Moreton* was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the death of her husband, made an appointment of the 100 *l.* but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the 100 *l.* brought their bill to be paid that sum.

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Willis v.
Shorrell,
1 *Atk.* 474.

Lord *Hardwicke* observed, that though by the several statutes relating to fines, all right, claim and interest which strangers had were barred by a fine, yet that such a stranger as *John Moreton*, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

339. A fine and non-claim is a good bar to a writ of error, in consequence of the word *actions* in the second saving of the stat. 4 *Hen.* 7. and a fine is also a good bar to a writ of error to reverse a common recovery.

Writ of error.

Bartholomew
v. Bellfield,
Cro. Jac. 332.

CHAPTER XI.

Of the different Savings in the Statute 4 Hen. VII. and the Exceptions in Favor of Infancy, Coverture, &c.

Of the first saving.

340. **T**HE great inconveniences which arose from the statute of Non-claim, were removed by the statute 4 Hen. VII. and a proper medium was established between the unbounded latitude given by the former of those statutes, and the rigor of the common law ; for the doctrine of non-claim was restored, but the time allowed for making the claim was extended from one to five years.

4 Hen. 7.
c. 24. s. 3.

The words of this clause which is called the first saving are “ and saving to every
“ person and persons, and to their heirs,
“ other than the parties to the said fine,
“ such right, title, claim and interest, as
“ they have to or in the said lands, tene-
“ ments or hereditaments, at the time of
“ such fine ingrossed, so that they pursue
“ their title, claim, or interest by way of
“ action

“ action or lawful entry within five years
 “ next after the same proclamations had
 “ and made.”

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341. In consequence of this clause, it follows that all those who have any present right or claim to lands whereof a fine is levied, are allowed five years, to be counted from the day on which the last proclamation was made to make their claim, and although there be no transmutation of possession, and the cognizor be in of the old use, yet after five years it will operate as a bar to all claims whatever. Shep. Tou. 30.

If therefore a tenant in tail is disseised, and the disseisor levies a fine with proclamations, the tenant in tail having a present right, may defeat the fine at any time within five years after the last proclamation has been made. But if he neglects to make his claim within that time, he will be for ever barred by the fine; and if the tenant in tail dies before the five years are expired, his issue will not be allowed a new period of five years to make his claim, but only so much of the five years as was not passed in the life-time of his ancestor. 2 Wilf. Rep. 19.

With respect to the mode of avoiding a fine within the term prescribed by the Shep. Tou. 30.
3 Rep. 87.
b.

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statute it will be pointed out in a subsequent chapter.

*Of the second
saving.*

Ante f. 257.

342. By the common law persons in remainder and reversion were frequently barred by the neglect of the particular tenant to make a claim within a year and a day after the fine was levied; and this is commonly assigned as the only reason for making the statute of Non-claim, but cases of this kind are particularly provided for by the following clause in the stat. 4 *Hen.* VII. which is usually called the second Saving: “And also saving to all other
“ persons such action, right, title, claim,
“ and interest in or to the said lands, tene-
“ ments or other hereditaments as shall
“ first grow, remain, or descend, or come
“ to them, after the said fine ingrossed and
“ proclamations made, by force of any
“ gift in tail, or by any other cause or
“ matter had and made before the said
“ fine levied, so that they take their action,
“ or pursue their said right and title ac-
“ cording to law, within five years next
“ after such action, right, claim, title,
“ or interest to them accrued, descended,
“ fallen or come.

4 *Hen.* 7.
c. 24. f. 4.

343. In

343. In consequence of this clause all those to whom a right first accrues, at any time after a fine has been levied, are allowed five years, to be computed from the day on which their right first accrued to make their claim.

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Thus if a tenant in tail makes a feoffment, and the feoffee levies a fine, the issue in tail is within the second saving, and shall have five years from the death of his father to make his claim and avoid the fine; because he is the first to whom a right accrued and descended after the fine was levied, for his father could not enter against his own feoffment.

3 Rep. 87. a.
& b.
Plowd. 374.

In the same manner if a tenant in tail bargains and sells his estate tail to a stranger in fee, who levies a fine of it with proclamations, the issue in tail is within the second saving, because the right first accrued to him, as his father could not enter against his own bargain and sale.

Penyfton v.
Lyfter,
Cro. Eliz.
896.

344. No person however is within the second saving, but he to whom the right of avoiding the fine first accrued, so that those who claim under the person to whom

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such right accrued, are only allowed so much of the five years, as have not elapsed in the life-time of their ancestor.

Plowd. 374.
3 Rep. 87. b.
Cro. Eliz.
826.

Thus it is laid down by *Dyer* and *Catline* that if a tenant in tail be disseised, and the disseisor levies a fine, the right of reversing the fine first accrues to, and attaches in the tenant in tail himself, so that if he lets five years pass without impeaching the fine and then dies, his issue will be for ever barred, for they are not within the second saving, because the right first accrued to their ancestor and not to them.

The Justices *Southcote* and *Weston* dissented from this opinion, and contended that every issue in tail should have five years, as a new right came to every one of them *per formam doni*, which right, as they took it, the makers of the Act intended to preserve, and to this purpose the words, by force of any gift in tail, were put in the second saving. But this opinion was utterly disallowed by the said chief justices, who said that the word *first*, which ought to be added to the word *descend*, and then it would be, *shall first descend*, will not suffer every descent to have five years.

345. If a tenant in tail either of a legal or a trust estate levies a fine, and five years pass, and afterwards the tenant in tail dies without issue, the persons in remainder or reversion are within the second saving, and have therefore five years to make their claim, from the death of the tenant in tail without issue, because their right did not accrue until the determination of the estate-tail.

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Plowd. 374.
T. Raym.
151.

346. If a tenant in tail discontinues his estate reserving a rent, and dies, and the issue in tail accepts of rent from the discontinuee, who afterwards levies a fine with proclamations, the acceptance of the rent by the issue in tail, bars him from claiming the estate-tail: but upon the death of the issue in tail, his issue will have five years to avoid the fine, in consequence of the second saving, because he was the first person to whom the right of reversing the fine accrued.

Shep. Touch.
33.

347. In consequence of the statute 32 Hen. VIII. c. 28. which has been stated in a former chapter, a fine levied by a husband alone, of any lands which are the freehold and inheritance of the wife, shall not

Ante f. 198.

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8 Rep. 72. b.

not make any discontinuance, or be prejudicial to the wife or her heirs, but she or they may enter on the lands and defeat such a fine. Although the words of this Act are very general, yet if the husband levies a fine with proclamations, and five years pass after his death, without any entry or claim by the wife, she will not only be barred of her entry but also of her right; for the object of the statute was only to provide against the discontinuance, which was a grievance peculiar to married women, but not to invalidate fines duly levied, as to married women, they having a remedy in common with others by entry or claim to avoid the fine. Besides though the words of the statute are general "that such a fine shall not be prejudicial to the wife or her heirs", yet the following words, viz. "But that she may lawfully enter according to her right and title therein, are explanatory, and allow her an entry only in such cases where she had a right before the statute."

348. If a married man levies a fine of his own inheritance, and five years pass, his wife is not thereby barred of her dower, but is within the second saving of the statute,

statute, and will be allowed five years from the death of her husband to make her claim, because her title to dower did not accrue until that period.

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Plowden was of opinion that in a case of this kind the wife was not bound to make her claim within five years after the death of her husband, but might claim her dower at any indefinite period of time; Sir *Edward Coke* says the contrary was expressly determined in 4 *Hen. VIII.* and that determination has ever since been held to be good law.

Plow. 373. note.

2 Rep. 93. a.
Dampport v.
Wright.
Dyer 221. a.
9 Vin. Ab.
245.

349. If the wife's title to dower does not accrue at the death of her husband, but commences at a subsequent period, she will be allowed five years from the time when it accrued.

A married man levied a fine with proclamations, and was afterwards indicted and outlawed for high treason. Some years after his death his heirs reversed the outlawry by writ of error, and then the wife claimed her dower.

Menvill's
case,
13 Rep. 19.
2 Hawk.
P. C. c. 49.
f. 44.

It was resolved that although more than five years had elapsed since the death of the

the

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the husband, yet the fine was no bar to her, because as long as the attainder for treason stood in force she could not claim her dower; but as soon as the outlawry was reversed, a title to dower first accrued to her, and therefore she was within the second saving, and had five years from the reversal of the outlawry to pursue her right.

350. If there be no person who has a right to make a claim, at the time when a fine is levied, and afterwards some person does acquire such a right, he will be allowed five years from the time when he acquired the right of avoiding the fine to make his claim.

Stanford's
case, cited
Cro. Jac. 61.

Thus where a person who was entitled to a term for years in reversion expectant on another term for years died; the first term expired, the lessors entered and levied a fine with proclamations. Five years passed before administration was granted of the effects of the person who had the reversionary term. It was resolved that the administrator was within the second saving of the statute, and should have five years to pursue his right from the time administration was granted, because until then

then there was no person who could claim.

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351. Strangers to fines, having several distinct rights, by several titles, accruing at different times, shall have several periods of five years allowed them to avoid a fine; that is, five years after the accruing of each title, so that if a right accrues to a stranger when a fine is levied, which he neglects to pursue within the limited time, and another right accrues to the same stranger at any time after, he is then comprehended within the second saving of the statute, as to the new right, upon upon the principle that, *quando duo jura in una persona concurrunt æquum est ac si essent in diversis*.

*Of persons
having dis-
ferent rigts.*
Shep. Tou.
34.

This construction is certainly not consistent with the letter of the statute, for in consequence of the words "other persons" it appears clearly to have been the intention of the statute, that no person who was comprehended in the first saving, should take advantage of the second; and in the case of *Stowell v. Zouch*, *Dyer* contended that this was the true construction of the statute, but however the

9 Rep. 105.
b.
Plowd. 372.

law

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Cro. Eliz.
220.Laund v.
Tucker,
Cro. Eliz.
254.
3 Rep. 78. b.

law has always been held to be other-
wife.

Tenant for life levied a fine to a stranger, and the person in reversion neglected to enter within five years after the fine was levied, afterwards the tenant for life died. It was determined that the reversioner should have another period of five years from the death of the tenant for life, to make his claim, for in this case two distinct rights accrued to him, the first upon the forfeiture which the tenant for life committed by levying the fine, and the second upon the death of the tenant for life.

9 Rep. 105.
b.

352. It is laid down by Sir *Edward Coke*, that if a lessee for years is ousted, and the person in reversion disseised, and the disseisor levies a fine with proclamations, both the lessor and lessee are barred, if they do not make their claim within five years after the fine has been levied, and the lessor will not be allowed another period of five years after the expiration of the term, to make his claim; because the lessor might have brought an assize or other real action, immediately after the

fine was levied, and being thus comprehended within the first saving, he cannot take advantage of the second. This doctrine has however been since contradicted and is not now held to be law.

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A lessee for 21 years, who was seised in fee of other lands in the same manor, made a lease for life of all the lands, and levied a fine with proclamations of as many messuages, &c. as comprehended not only the lands whereof he was seised in fee, but also the lands which he held for years; the lessee continued in possession and paid his rent. Upon the expiration of the term, the lessee claimed the inheritance of the land which he had held by lease and would have barred the lessor, by means of the fine and non-claim, but it was determined by all the judges that the lessor should have a new period, of five years from the expiration of the term, to make his claim and avoid the fine.

Fermor's
case,
3 Rep. 77.
2 And. 1-6.
Jenk. 253

353. This determination is said by Sir *Edward Coke* to have been founded on the circumstances of fraud which appeared in the case, the principal of which was that the lessee continued in possession after he had

2 Vent. 534.

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1 Vent. 242.

had levied the fine and regularly paid his rent, so that the lessor could have no notice that a fine had been levied of his lands. But in other books the judgment is said not to have been founded on the fraud which appeared in the case, but upon the construction of the statute; and the doctrine that where a lessee for years makes a feoffment and then levies a fine, the lessor need not make his claim within five years after the fine has been levied, but is allowed another period of five years from the determination of the term, was finally established in the following case.

Whaley v.
Tancred,
1 Vent.
241.
T. Raym.
219.
1 Atk. 571.
S. P.

A lessee for years made a feoffment, and then levied a fine; five years passed, and the question was, Whether the lessor was barred by his non-claim during the five years which elapsed immediately after the fine was levied, or should be comprehended within the second saving of the statute 4 Hen. VII. and be allowed another period of five years from the expiration of the term. The Court resolved that the lessor should have five years from the expiration of the term to avoid the fine, in the same manner as if a lessee for life had levied a fine; the cases being exactly similar.

354. No person who is within the first saving of the statute 4 *Hen. VII.* can be comprehended within the second saving, unless the second right which accrues to him is different from the first, for if it is only the same right which accrues a second time, the non-claim for five years after the right first accrued will be a good bar.

A tenant in tail made a lease for three lives, which was not warranted by the statute 32 *Hen. VIII. c. 28.* He then levied a fine and died without issue. Five years passed without any claim, but on the expiration of the lease, the person in remainder entered. The Court resolved that he was barred by his non-claim during the five years which elapsed immediately after the fine was levied, and should not have a new period of five years after the death of the lessee, because he had no other title after his death than he had before, for his title arose upon the death of the tenant in tail without issue, when he might have brought his formedon.

Salvin v.
Clerk,
Cro. Car.
156.
W. Jones
211.

355. If lands are extended on two statutes, and the person who is seised of the land levies a fine, it devests the estates of

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the cognizees of such statutes, and the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred. But with respect to the cognizee of the second statute, he need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine, by the second saving in the statute 4 Hen. 7. because until then his right did not accrue.

Deighton v.
Grenville.

2 Vent. 333.

1 Show. 36.

1 Skin. 260.

Thomas Lewis being seised in fee of the premises in question, acknowledged a statute for 1200 *l.* to *William Knight*; he afterwards acknowledged another statute for 1000 *l.* to *Richard Gerrard*, and another for 5000 *l.* to *Sir James Elwes* and *Richard Burrows*; execution was sued out on all these statutes, and the lands were extended. *Thomas Lewis*, being in actual possession, sold the lands for 4000 *l.* to *John Lewis*, and levied a fine of them with proclamations. *John Lewis* devised the lands to his brother *Edward Lewis*, and the heirs male of his body, and for want of such issue to his

his own two daughters. *John Lewis* died, and *Edward Lewis* being in actual possession, levied a fine with proclamations, to the use of himself and his heirs, and died without issue, whereby the lands descended to the two daughters of *John Lewis*, who entered, and having married the Earls of *Huntingdon* and *Scarsdale*, they also entered, and were seised in right of their wives. Administration to *Burrows*, the surviving cognizee of the last statute, was committed to *Ann*, wife of the defendant *Grenville*, as to that statute and the extent thereon, and *Grenville* and his wife, who was also administratrix to *Gerrard* the cognizee of the second statute, having acknowledged satisfaction upon it, and caused it to be vacated, entered upon the Earls of *Huntingdon* and *Scarsdale*, as administratrix to *Burrows*, in whom the last statute was vested, and claimed the money due on it, whereupon the said Earls brought an ejectment in the Court of King's Bench in the name of *Deighton*, for the recovery of the lands.

The question was, whether *Grenville*, a representative to *Burrows*, the cognizee of the last statute, which was a reversionary interest to commence after the determina-

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tion of *Gerrard's* extent, was barred by the fine of *Thomas Lewis* and five years non-claim, or was within the second saving of the statute 4 *Hen.* 7. and should be allowed five years to make his claim from the time when satisfaction was acknowledged on *Gerrard's* statute.

The case was argued several times in the Court of King's Bench, and in 4 *Jac.* 1. judgment was given for *Grenville*, that *Burrows's* interest was not barred by the fine. A writ of error was brought in the Exchequer Chamber, where the case was also several times argued. Mr. Justice *Ventris* contended that there was a very great difference between this case and the case of reversions on estates for lives or years. 1st, Because in those estates there was either by an express limitation of the parties or the operation of law, a certain end of the estate beyond which it could not last, and until which it was not properly determined, which an estate held by extent has not. 2d, Because if a person who has a reversion after an estate held by extent, was allowed five years to make his claim after the extent was determined by a perception of the profits, or an acknowledgment

Vide 2 Vent.
333.

ment of satisfaction on record, then a claim was let in after an estate which no man could see the end of, for no person could tell when an extent would be satisfied by a perception of the profits, and much less whether satisfaction would ever be acknowledged; whereas other estates have a known and certain determination, so that it would be impossible to tell within what space of time a possession could be quieted, and thus the great end of the statute of fines would be defeated. 3d, Because it would be in the power of the party who had the extent, to protract the time as long as he pleased, for until he thought proper to bring a *scire facias ad computandum*, the statute would never be satisfied, so that it would be in the power of a stranger to make the estate of a person who was in possession under a fine, liable to a future claim as long as he pleased.

The judgment of the Court of King's Bench was reversed by a majority of six Judges against two. But that Court refused to award execution, because there was a mistake in the writ of error, upon which a new writ of error was brought, whereon the judgment was affirmed for *Greneville*,

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there being three Judges for reverſing, and three for affirming, and a majority being required to reverſe the judgment, it was of courſe to ſtand.

*M. S. caſes in
the Houſe of
Lords.*

A writ of error was then brought in the Houſe of Lords, where it was contended on the part of the plaintiff, that Mr. *Grenville* could not, by acknowledging ſatisfaction on *Gerrard's* ſtatute, gain any new right to enter to avoid the fine levied by *Edward Lewis* above nine years before, by which, and by five years non-claim, her intereſt in the laſt extent was barred, becauſe an entry might and ought then to have been made into the extended eſtate, and the contrary opinion would tend very much to weaken the ſecurity of a fine and non-claim, which is the higheſt and beſt ſecurity in the law for quieting people in their eſtates, and preventing ſuits; and it would therefore be of very pernicious conſequence to all purchaſers and owners of eſtates, if ſuch old dormant incumbrances were ſet up againſt a fine and non-claim, and ſupported by ſuch a method as the vacating a ſtatute long before extinguished, for thereby eſtates might be incumbered, which
had

had been long enjoyed without interruption.

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On the other side it was argued for the defendant, that it was not necessary to make any claim upon *Burrows's* statute, until *Gerrard's* statute appeared upon record to be satisfied, and so a claim made by the defendant by entry upon the premises, within five years after satisfaction entered upon record, on *Gerrard's* statute, was sufficient to prevent *Burrows's* extent from being barred by the fine. That this case did not differ in reason from the common and known case where *A.* tenant for life, remainder in fee to *B.* is disseised, and the disseisor levies a fine, and there is five years non-claim, though the estate of tenant for life be barred by this five years non-claim, and the remainder man may if he please enter upon the five years non-claim by tenant for life; yet he may waive such entry, and will have a new period of five years after the death of tenant for life, to make his claim; so although *Burrows* might, if he had pleased, have entered upon the five years non-claim by *Gerrard*, yet he might stay and expect until satisfaction was entered upon the record of *Gerrard's* statute:

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for as the death of the tenant for life is the proper and natural determination of an estate for life, so the entering satisfaction upon record, is the proper and natural determination of an extent upon a statute, and in the one case as well as the other, before such determination, the remainder man or reversioner is not compellable to make his claim to avoid the fine.

26th April,
1699. Lords'
Journals, vol.
16. p. 454.
Plowd. 538.

The judgment of the Court of King's Bench was affirmed (a).

356. Although the statute 4 *Hen. 7.* does not extend to the possessions of the church, yet in case a bishop, dean, vicar or prebendary, should neglect to make his claim within five years after a fine was levied of an estate to which he was entitled, in right of his bishoprick, &c. he will be barred during his life, but his successor will be allowed five years to avoid the fine, from the time of his becoming entitled to the lands.

Idem.

357. In the same manner, all those who have offices for life, to which lands and tenements are annexed, must make their

(a) This appeal to the House of Lords is not mentioned in any of the Reporters.

claim

claim within five years after a fine has been levied of such lands and tenements, otherwise they will also be barred during their lives. But each successive officer will be allowed five years to avoid the fine, from the time when he becomes entitled to the lands.

358. If the estate which passed by a fine is at any time afterwards defeated, the fine will by that means lose all its force and effect, not only with respect to the person who avoided it, but also with respect to all other persons, except those who claim by force of an intail. Thus it is said in the case of *Stowell v. Zouch*, that if there be tenant for life, remainder for life, remainder in fee, and the first tenant for life aliens, and the alienee levies a fine, the person in remainder for life may enter and defeat the fine, in which case it will not bar the remainder man in fee.

Plowd. 358.
2 Inst. 518.
West. Symb.
p. 2. 73. a.

Plowd. 359.

359. By the common law, and also by the statute *de modo levandi fines*, all those who laboured under certain disabilities at the time when a fine was levied, were not affected by it; but they or their heirs might avoid it, at any distance of time.

Of the exceptions in favour of . . .
Bract. l. 5. c.
29. f. 3.
Rietal. l. 6. c.
54. 2 Inst.
516.

This

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4 Hen. 7. c.
24. f. 5.

This doctrine was altered by the following clauses in the statute 4 Hen. 7.—“ And if
“ the same persons at the time of such ac-
“ tion, right and title accrued, descended,
“ remained or come unto them, be *covert*
“ *de baron*, or within age, in prison, or out
“ of this land, or not of whole mind; then
“ it is ordained, &c. that their action, right,
“ and title be reserved and saved to them
“ and their heirs, until the time they come
“ and be at their full age of twenty-one
“ years, out of prison, within this land, un-
“ covert, and of whole mind; so that they
“ or their heirs take their said actions, or
“ their lawful entry, according to their
“ right and title, within five years next af-
“ ter that they come and be at their full
“ age, out of prison, within this land, un-
“ covert, and of whole mind; and the
“ same actions pursue, or other lawful en-
“ try take, according to law.

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“ And also it is ordained, &c. that all
“ such persons as be *covert de baron*, not
“ party to the fine, and every person being
“ within the age of twenty-one years, in
“ prison, or out of this land, or not of
“ whole mind, at the times of the said fines
“ levied and ingrossed, and by this said act
“ afore

“ afore except, having any right or title,
 “ or cause of action to any of the said lands
 “ and other hereditaments, that they or
 “ their heirs, inheritable to the same, take
 “ their said actions, or lawful entry, ac-
 “ cording to their right and title, within
 “ five years next after that they come and
 “ be of age of twenty-one years, out of
 “ prison, uncovert, within this land, and of
 “ whole mind, and the same actions sue, or
 “ their lawful entry take, and pursue ac-
 “ cording to the law; and if they do not
 “ take their actions and entry as is afore-
 “ said, that they, and every of them, and
 “ their heirs, and the heirs of every of
 “ them, be concluded by the said fines for
 “ ever, in like form as they be that be par-
 “ ties or privies to the said fines.”

360. In consequence of these two clauses, all those who labour under any of the disabilities therein specified, either at the time when a fine is levied, or when a right to lands whereof a fine has been levied first accrues to them, are allowed five years from the removal of their disabilities to make their claim.

361. If

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Plowd. 366.

361. If an infant be in his mother's womb when a fine is levied, he will be allowed five years from the time he attains his full age to make his claim : for altho' he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception.

Plowd. 375.

1 Leon. 215.

362. If a person labours under several disabilities at the same time, as if a woman is covert, under age, of insane mind, and in prison at the time when a fine is levied, or when a right to lands whereof a fine has been levied accrues to her, and one or more of those disabilities are removed, still the five years given by the statute will not commence until after all her disabilities are entirely removed.

2 Ark. 614.

Plowd. 366.

363. It is stated by *Plowden*, in his report of the case of *Stowell v. Zouch*, that it was affirmed by many of the justices, and denied by none of them that he heard, that although the persons comprised in the exception were not under such defects or impediments

pediments at the time of the fine levied, but became so against their will, after the fine levied, and before the last proclamation, and were in such degree at the time of the last proclamation, they shall not be bound to five years next after the last proclamation, but they shall have five years next after their impediments or imperfections removed.

364. It was also said in the same case by *Brown and Saunders*, that if a stranger to a fine who is of sound mind, becomes *non sanæ memoriæ*, or is imprisoned the third year after the proclamations made, and so continues until the five years are expired, and afterwards he becomes of sound mind, or is out of prison, he shall not be concluded by the fine; for laches in prosecuting his right cannot be imputed to him who wants liberty or memory, and therefore such person is not comprehended in the intent of the statute. But in this case if a stranger to the fine in the third year had gone beyond sea, or had taken husband and so had continued, until the five years were passed, there he should be bound; for the going beyond sea, or taking husband, are voluntary acts, but infanti-

Plowd. 366.

Fines.

ty of mind, or imprisonment, are against the will of the party.

365. The doctrine laid down in the last section has been exploded by two modern cases, in which it has been laid down as a rule, that when once the five years allowed to persons labouring under disabilities, to avoid a fine begin, the time continues to run, notwithstanding any subsequent disability.

Vide Doe ex
dem. Durcure
v. Jones.
4 Term Rep.
B. R. 300.

Plowd. 375.

366. It is said by some of the judges in the case of *Stowell v. Zouch*, that if a person whose defects or impediments are once removed, falls within a month after into the same defects or impediments again, and continues so all the five years, or at the end of the first month of the five years dies, his heir within age, the five years before commenced shall proceed, and non-claim within the same five years shall bind the party and his heirs, as well as if he had been void of all defects or impediments during the whole five years.

Plowd 366.
1 Leon 215.

367. Although the statute 4 Hen. VII. allows infants five years after they have attained their full age, to make their claim,
yet

yet an infant may if he pleases, make his claim before he attains that age.

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368. The privileges of infancy, coverture, &c. are only given to those to whom a right first accrues, and in whom it first attaches; for if a person to whom a right first accrues dies before the expiration of the first five years which are allowed him to make his claim, and such right descends upon his son or heir at law who is then under age, or labours under any of the other disabilities mentioned in the act, still such son or heir must make his claim before the five years are expired, which commenced in the life-time of his ancestor, otherwise he will be for ever barred, because the right did not first accrue to him, but to a person who was not under any disability.

John Stowell being seised in fee, was disfeised by *John Zouch*, who levied a fine with proclamations. Three years after the fine was levied, *John Stowell* died, without having made any entry or claim to avoid the fine, leaving his grandson and heir at law, *Thomas Stowell*, the demandant, an infant of the age of six years, who made no claim

Stowell v.
Zouch.
Plowd. 355.
Jenk. Cent.
6. case 74.

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claim during his minority, but entered on the lands within one year after he had attained his full age.

It was determined by a great majority of all the judges in the Exchequer Chamber, after many solemn arguments,

1. That *Thomas Stowell* being a stranger to the fine, was clearly barred by the body of the act, unless he would take advantage of the exception in favour of infants, &c. and that he was not within the exception, because it only extends to such infants, &c. to whom a right accrues at the time when a fine is levied: whereas in the present case, no right accrued to *Thomas Stowell* at the time when the fine was levied, his grandfather being then living.

2. That *Thomas Stowell* was originally within the first saving of the statute, as heir to his grandfather, to whom the right first accrued, being included in the words "saving to every person and persons, and to their heirs;" but not having pursued his remedy within the time prescribed, he could not now take any advantage of the first saving: and, with respect to his infancy

at

at the time of his grandfather's death, it could be of no service to him, because the statute only gives the privilege of infancy to those to whom a right first accrues: but where a right first accrues to a stranger who is of full age, and the five years begin to run, if such stranger dies before the expiration of the five years, leaving his heir under age, the heir can have no privilege of infancy, but must make his claim before the expiration of the five years, which began to run in the time of his ancestor.

3. That *Thomas Stowell* was not within the second saving, which preserves to all other persons such right, title, &c. as shall first grow, remain or descend to them after the said fine ingrossed, for several reasons; 1st, Because, in consequence of the words *other persons*, this saving only extends to those who are not comprised in the first, and it was not the intention of the act to aid those persons in the second saving who are comprehended in the first. 2d, The words, first grow, remain, or descend, only extend to the person in whom the right first attaches after a fine is levied; whereas no new right accrued to *Thomas Stowell* after the fine was levied, his only title being as

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heir to his grandfather, in whom the right attached when the fine was levied.

Case of persons dying under their disabilities.

369. If a person to whom a right accrues to lands whereof a fine has been levied, labours under any of the disabilities, specified and excepted in the statute 4 Hen. VII. and dies before his disabilities are removed, it seems to be a doubtful point whether the heir of such a person be obliged to make his claim within five years after the death of his ancestor, or be allowed an indefinite period of time for that purpose.

2 Inst. 519.
Cro Eliz. 219.
1 Leon. 211.
Sav. 128.

This doubt arises from a difference of opinion between Sir *Edward Coke* and *Anderfon*; Sir *Edward Coke*, in his report of the case of *Sunie v. Howes*, states that *Thomas Cotton* being tenant in tail of a moiety of certain lands, and tenant for life of the other moiety, with remainder to *William Cotton*, his eldest son in tail, *William Cotton* went to *Antwerp*. *Thomas Cotton* levied a fine with proclamations of all the lands, and *William Cotton* died soon after at *Antwerp*, without having ever returned to *England*, leaving a son under age, who entered on the lands. It was adjudged, that as to the moiety whereof *Thomas Cotton* was
tenant

tenant in tail, *William* the son of *William* was barred by the statute 4 *Hen. VII.* But as to the other moiety whereof *Thomas Cotton* was only tenant for life, the entry of *William* the grandson was lawful, and avoided the fine; for although *William* the son could not take advantage of the clause which saves the right of those who are beyond sea, provided they make their claim within five years after their return, because *William* the father never did return, yet as persons who are out of the realm at the time when a fine is levied, having a present right, are excepted out of the body of the act, which makes the bar, therefore where a person was beyond sea at the time when a fine was levied, and never returned, he was within the exception made in the body of the act, and his heirs might make their claim at any distance of time. That it was the same where an infant, not being a party to a fine, and having a present right, died during his infancy, his heirs might make their claim at any distance of time. That the same doctrine took place with respect to a man *non compos*, who died in that situation, or a man in prison who died before he had recovered his liberty, or a married woman who died in the lifetime of her husband; for all these were

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within the reason adjudged, of a person who was out of the realm, and never returned.

It is also laid down by Sir *Edward Coke*,
 4 Rep. 125. b. in *Beverley's* case, "That if a man levies
 " a fine with proclamations, and at the
 " time of the fine levied, he who has a
 " right is *non compos*, and afterwards he re-
 " covers his memory, in this case he ought
 " to pursue his action, or make his entry,
 " within five years after he becomes of
 " sound memory; and in such case, in
 " pleading, he shall shew, that, at the time
 " of the fine levied, he was *non compos men-*
 " *tis*, and all the special matter: but if he who
 " has such right is an idiot, or *non compos*
 " *mentis*, and never recovers his memory,
 " the heir may have his action, or make his
 " entry when he will; for he is excepted
 " out of the body of the act, and is not
 " bound to make any entry, or bring his
 " action within any time: but the party
 " himself, if he recovers his memory. The
 " same law, if he who is beyond sea at the
 " time of the fine levied, and dies, there
 " his heir may enter, or bring his action
 " when he will."

Cotton's
 case.

1 Leon. 217.

In *Leonard's* report of *Cotton's* case, it
 was held, that as to the moiety whereof Sir
Thomas

Thomas Cotton was tenant for life, the fine was no bar, but that *William* the grandson might enter at any time within five years after he attained his full age, for *William* his father was not bound by the statute 4 Hen. VII. because he was beyond sea at the time when the fine was levied, and never returned; but that, by the equity of the statute, his issue should be allowed five years to make his claim, from the time he attained his full age. And *Anderson*, Chief Justice, is reported to have said, that although *William* the father died beyond sea, yet if his son did not make his claim within five years after the death of his father, being of full age, and without impediment, he should be for ever barred (a).

1 Leon. 215

I have not been able to find any other case in which this point has arisen, except that of *Hulm v. Heylock*, which has been already stated, where the Court concurred in opinion with *Anderson*: but as that case

Ante f. 329.

(a) It is observable that *Anderson* himself has reported *Cotton's* case, (part 1. page 264.) but no such *dictum* is mentioned by him.

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was determined without being argued, it cannot be much relied on as an authority.

370. As the opinions both of Sir *Edward Coke* and *Anderson* on this point were delivered *obiter* and in the course of argument only, and as this question has (I believe) never been judicially determined, it may not be improper to add some observations on it.

In the first section of the statute 4 *Hen. VII.* it is enacted, “ that a fine shall con-
 “ clude as well parties as strangers to the
 “ same, except women covert (other than
 “ be parties to the said fine) and every per-
 “ son then being within the age of 21 years,
 “ in prison, &c.” And by the sixth section
 of the same statute it is enacted, “ That all
 “ such persons as be *covert de baron*, &c.
 “ at the time of the said fines levied, &c.
 “ having any right or title, &c. That they
 “ or their heirs inheritable to the same
 “ take their said actions, &c. within five
 “ years next after they come and be of the
 “ age of 21 years, out of prison, &c. And
 “ if they do not take their actions, &c. as
 “ is aforesaid, then they and every of them
 “ and .

“ and their heirs be concluded by the said
 “ fines for ever.”

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To support the opinion of *Anderson* the words “ that they or their heirs inheritable
 “ to the same take their said actions, &c.” and the words “ if they do not take their
 “ actions, &c.” must either be construed to extend to the heir of an ancestor who dies under his disability, or else it must be admitted that this is a case not provided for by the statute.

Upon the latter supposition the only argument that can be urged is that as the original object of fines was to preserve the peace and quiet of the kingdom by extinguishing all dormant titles, and as the intention of the stat. 4 *Hen. VII.* was to revive the doctrine of non-claim, that statute ought to be construed in such a manner, as to render a fine a compleat bar to every right and claim which is not prosecuted within five years after it accrues, and so as not to allow in any case whatever the existence of a right to avoid a fine, at an indefinite period of time.

On the other side it may be said in support of Sir *Edward Coke's* opinion that the

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statute 4 *Hen. VII.* being in fact a statute of limitations ought to be construed strictly; that if no saving had been added to the statute, it is clear that all those who had a right at the time when a fine was levied, and who were then under coverture, infants, &c. would have been comprehended in the exception contained in the first section of that statute and therefore would not have been at all affected by it. That the words, they and their heirs, in the sixth section, were inserted merely with a view to the case of persons whose disabilities should be removed, but who should die before the expiration of the five years allowed them for making their claim, in order to confine their heirs to so much only of the five years as was not expired in the life-time of the persons whose disabilities were removed, and to prevent them from claiming a new period of five years (a).

Vide Stowell
v. Zouch,
ante f. 368.

(a) In a collection of opinions lately published is one given on this point by the late Mr. *Booth*, in which he concurs with Sir *Edward Coke* in maintaining that where a person dies under his disabilities, his heir may enter at any indefinite period of time. *Cases and Opinions* Vol. 1. p. 423.

Judge

Judge *Jenkins* appears to have agreed with Sir *Edward Coke* on this point, for he says "an infant or a person beyond the seas or in prison is disseised, and the disseisor levies a fine of the land with proclamations and five years pass afterwards; they being beyond sea, within age or in prison, and dying under these impediments respectively; during these impediments their heirs are not bound by the fine, for they are excepted, and there is no provision made in the exception that the said heirs shall enter, or claim, or bring their action within five years after the full age or liberty of such heirs. See the provision in the case of the limitations of actions by 21 *Jac.* 1. c. 16. for this point."

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Cent. 4. ca. 97.

The general intention of the statute of Limitations is precisely the same with that of the statute 4 *Hen.* VII. In both, a non-claim for a certain number of years, is declared to be a final bar, and the same exception is made in favor of persons under age, &c. But in the clause whereby persons thus excepted are directed to make their claim within a certain time after the removal of their disabilities, the statute

of

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of Limitations runs thus: "So as such
 " person and persons, or his and their heir
 " and heirs shall, within ten years next
 " after his and their full age, discovery, or
 " coming of sound mind, enlargement out
 " of prison, or coming into this realm, or
 " death, take benefit of, and sue for the
 " same, and at no time after the said ten
 " years."

To this clause *Jenkins* evidently alludes in the passage above quoted, and from the difference which is observable between the two statutes, by the insertion of the words "*or death*", in the statute of Limitations, he seems to have formed his opinion, and agreed with Sir *Edward Coke*; the insertion of these words shews that the Legislature were aware of the difficulty in the statute 4 *Hen. VII.* where the persons excepted out of the body of the Act died under their disabilities, and took care in the statute of Limitations to guard against it, by express words (*a*)

(a) The statute 10 & 11 W. 3. which enacts, that no writ of error shall be brought to reverse a fine after 20 years has a saving for infants, &c. in which is inserted the words "*or death*" in the same manner as in the statute of Limitations. Vide *infra*.

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Of some other Effects of a Fine.

371. **T**HE operation of a fine frequently depends on the particular situation of the cognizor or cognizee, respecting the property of which it is levied.

A fine, sometimes operates as a release.

Thus if one joint-tenant levies a fine to his companion it will operate by way of release.

John Stile and Susan a feme sole were joint-tenants for life, Susan married, and she and her husband granted by fine to John Stile tenementa prædicta et totum et quicquid habent pro termino vitæ prædictæ Susan, &c. The question was, whether this fine should enure by way of grant, or release, and it was resolved that it should enure by way of release.

Eustace v. Scawen, Cro. Jac. 696.

372. If one co-parcener in tail levies a fine to another *sur cognizance de droit*, &c. it does not enure by way of release, but by

1 Inst. 200. b. n. 1.

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by way of grant; and it will be a discontinuance and alteration of estate, without execution, because one coparcener may enfeoff another, and a fine is a feoffment of record.

Confirmation.

373. A fine may also operate as a confirmation of a former estate, which was before defeasible.

Seymour's
case, *infra*.

Thus if a tenant in tail bargains and sells his estate-tail in fee, and then levies a fine to the bargainee, the fine will operate as a confirmation of the estate which passed by the bargain and sale.

So if a tenant in tail makes a lease not warranted by the statute, confesses a judgment, makes a mortgage, or incumbers his estate in any other manner, and afterwards levies a fine, it will operate as a confirmation of all his prior charges and incumbrances.

1 Ab. Eq.
257.
19 Vin. Ab.
538.
3 Bac. Ab.
314.

Holbeach v.
Sambach,
Winch. 102.

In the same manner where a tenant for life and the remainder-man in tail join in granting a rent-charge in fee out of the land, and afterwards join in levying a fine to another person; the rent which

was

was before determinable will be confirmed by the fine.

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374. The operation of a fine levied by a tenant in tail who has the immediate reversion in fee in himself is to merge the estate-tail, and bring the reversion in fee into immediate possession, by which means it will become liable to the incumbrances of all those who were seised of it. So that if a tenant in tail with the immediate reversion in fee in himself, makes a lease, acknowledges a judgment, or incumbers his estate in any other manner, and his heir levies a fine, it will operate as a confirmation of the lease or judgment.

A fine lets in the reversion and makes it liable to prior incumbrances.

1 Atk. 5.

A person who was tenant in tail, with remainder to himself in fee, made a lease to commence *in futuro*, and died before the time when it was to commence, leaving issue a son, who some time after the death of his father, and before the commencement of the lease, levied a fine. It was agreed by the whole Court, that the remainder in fee was chargeable with the lease, and that it would have been a good charge on the remainder in fee, in case the tenant in tail had died without issue.

Symonds v. Cudmore,
1 Show. 370.
1 Salk. 333.
4 Mod. 1.

It

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It was also held, that the estate-tail was extinct by the fine, as much as if the tenant in tail had died without issue. 1. Because two estates in fee immediately expectant one upon another cannot subsist in the same person. 2. Because by the statute 32 *Hen. VIII.* a fine is declared to be a bar and discharge of the estate-tail. 3. Because the statute of *Westm. 2.* having made estates-tail a kind of particular estate, when the protection of the statute is taken away by the fine, they are, like all particular estates, subject to merger and extinguishment, when united with the absolute fee.

375. Where a fine operates so as to bring the reversion in fee into possession, it will not only subject such reversion to the debts and incumbrances of the person levying the fine, but also to the debts and incumbrances of all those who were intitled to such reversion prior to the person who levies such fine; because a reversion is affets whenever it comes into possession.

Earl of Shelburne v. Biddulph,
4 Brown
584.

Charles Lord Shelburne, being tenant in tail-male of the lands in question, with remainder to his brother *Henry* in tail-male, remainder to his own right heirs; demised them

them for three lives, with covenants for perpetual renewal. *Charles* Lord *Shelburne* died without issue, by which means his brother *Henry* became intitled to an estate in tail-male in the premises, with the reversion in fee in himself. In the year 1697, *Henry* Lord *Shelburne* levied a fine of those lands, and in consideration of his marriage settled them on himself for life, with remainder to his first and other sons.

The lessees having claimed a renewal on the death of some of the persons for whose lives the leases were granted, *Henry* Lord *Shelburne* refused to renew, alledging that as his brother *Charles* was only tenant in tail of the lands comprised in those leases, he had no power to make them, and that he was not bound by the covenants for renewal.

The Court of Exchequer in *Ireland* decreed, that *Henry* Lord *Shelburne* should renew those leases. From this decree there was an appeal to the House of Lords, and on behalf of the appellants it was argued, that tenant in tail at law, independant of the statute 32 *Hen. VIII.* had no right to make a lease absolutely to bind the issue in tail,

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tail, and much less the remainder man : and that even by that statute, a tenant in tail has no power to grant leases to bind those in remainder, and therefore the leases in question were absolutely void, as against the appellant, who did not claim under Lord *Charles*, or as issue in tail, but as remainder man. That the estate tail, out of which the leases first arose, being spent, and the appellant not claiming under it, but by a distinct limitation to himself in tail male, his fine could not let in Lord *Charles's* leases upon that estate, which came in lieu of the Earl's estate tail ; nor could it by consolidating the two estates, let them in upon the reversion ; both because the Earl acquired a new estate, and because the uses of the fine were never declared to him in fee, but directly to the uses of the settlement, by which, in consideration of his own marriage, the Earl had an estate for life only, with remainder to his first and other sons ; and these estates arose and were granted out of the estate tail which the Earl had before the fine, and not out of the reversion.

On the other side, it was contended, that by the fine which Earl *Henry* levied in
1697,

1697, the estate tail limited in remainder to him was barred and extinguished, in the same manner to all intents and purposes, as if he was dead without issue; and the reversion in fee which descended to him as heir of Lord *Charles*, immediately took effect, in possession. And as the new uses in the marriage-settlement of 1697 arose out of that reversion in fee, they were therefore subject to all antecedent incumbrances and engagements which could affect that reversion. That as this reversion in fee, after it had taken effect in possession by means of the fine, was specifically bound by the covenants for perpetual renewal; and as such covenants are considered as real agreements, and go with the land, so they are in their nature proper for a specific performance, and would in equity affect the legal interest of all those, who take the estate with notice of them. That all those claiming under the settlement of 1697 had notice of these leases and covenants, and were as much bound by an equitable lien upon the lands, as Earl *Henry* himself, especially in favour of lessees who had made very great improvements, and were therefore to be considered as purchasers of the right of renewal. After hearing counsel

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on this appeal, the following question was put to the Judges, *viz.* “Whether by the “fine levied by the appellant the Earl of “*Shelburne*, in *Easter Term* 1697, the re- “version in fee of the estate in question “was let in, subject to the leases in ques- “tion, made by *Charles Lord Shelburne*, “and the covenants therein contained for “a perpetual renewal?” And the Lord Chief Justice of the King’s Bench having delivered the unanimous opinion of the Judges to this effect, *viz.* “That the “leases for lives now in being were good “and effectual, as being served out of the “reversion in fee, which Lord *Charles* had “when he made them, and which was now “in Lord *Henry*; and that the covenants “for renewal were binding on Lord *Henry*, “as a lien on the same reversion, which he “had let in by barring, discharging and “extinguishing his estate tail.” It was therefore ordered and adjudged that the appeal should be dismissed, and the decree therein complained of, affirmed.

376. In the same manner where a person is tenant for life, remainder to his first and other sons in tail, with the reversion in fee in himself, and becomes indebted by bond,

bond, or incumbers the estate in any other manner: if, after the death of such a tenant for life, his son levies a fine, it will let in the reversion in fee, and make it liable to his father's incumbrances.

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Thomas Delahay on his marriage settled his estate on himself for life, remainder to his wife for life, remainder to his first and other sons in tail male, remainder to himself in fee. There was issue a son. *Thomas* the father died, indebted by bond, and the son afterwards died without issue. The question was, whether the reversion in fee, which was come into possession, should be assets to pay the bond debt of the father. Lord *Hardwicke* was of opinion that this reversion was assets, and his Lordship said, "indeed the son might have suffered a recovery, and barred the reversion in fee, and there the father's creditors would not have come in; if he had levied a fine only it would have barred the estate tail, but the reversion in fee would have been liable."

Kinaston v. Clark.
2 Atk. 204.

377. A fine being a judgment obtained by consent in a fictitious suit, and recorded in a court of justice, all those who are parties

Esseppel.
1 Inst. 352. 2.

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ties to it, and their heirs, are for ever concluded from averring or proving any thing against it, and therefore it operates towards them as an estoppel upon record.

Shep. T. 14.

Thus, although a fine levied by persons who have not an estate of freehold in the lands, is void as to all strangers; yet it will operate as an estoppel against all the parties to it. So if two persons are seised in fee, and a stranger levies a fine to them, and to the heirs of one of them, the other will be thereby estopped from claiming any thing more than an estate for life in the lands.

378. A contingent remainder may, before it vests, be barred by a fine, which will operate as an estoppel, so as to bind the interest that may afterwards accrue by the contingency.

Weale v.

Lower.

Pollexf. 54.

Fearne 287.

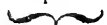
A. made a feoffment to the use of himself for life, and after the death of himself and *M.* his wife, to the use of *B.* his eldest son for life, and after the death of *A.* *M.* and *B.* to the use of *B.* and the heirs males of his body; and for default of such issue, to the use of the right heirs of *B.* *B.* had issue a daughter, and then by fine and deed

granted the premises to *D.* for 500 years, to commence after the death of *A.* *B.* died, *M.* died, and *A.* survived. It was held that the estate limited to *B.* was a contingent remainder, for the particular estate was only for the life of *A.* whereas *B.*'s estate was not to commence till after the death of *A.* and *M.* And although *B.* levied the fine for 500 years, and died before the contingency happened on which his remainder was to arise, yet, when the contingency did happen, his heir was bound by the fine; and the term for five hundred years limited by the deed to *D.* took place; for it was agreed, that the contingent remainder descended to his heir, that the fine operated from the beginning by conclusion, and although it passed no interest, yet that it should operate as an estoppel, and bind the heir.

379. Lands were devised to *A.* and *C.* and the survivor of them, and the heirs of such survivor in trust to sell; the estate was decreed to be sold; and it being referred to the Master to see whether the parties could make a good title, the Master reported that the parties could not make a good title, there being no fee simple in the

Vick v. Edwards, 3 P. Wms 377.
Vide Fearn 285.
1 Inst. 191.
a. n. 1.

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trustees; for the remainder in fee was contingent, it being uncertain which of the two trustees would be the survivor. Exceptions being taken to the Master's report, the Lord Chancellor held, that the trustees, by levying a fine, could make a good title to a purchaser by estoppel; and his Lordship cited the case of *Weale v. Lower*, where a fine was adjudged to pass an estate not vested by way of estoppel, and to convey an interest which accrued afterwards.

Forfeiture.

1 Inst. 251. b.

Gilb. Ten.

38. Prec. in

Ch. 591.

380. Where a person who is only tenant for life, levies a fine *sur cognizance de droit come ceo*, &c. it will operate as a forfeiture of his estate, because it is an attempt to create a greater estate than he can lawfully convey, and a renunciation of the feudal connection between the tenant and his lord. So if a tenant for life accepts a fine *sur cognizance de droit come ceo*, &c. it is also a forfeiture of his estate for life, for it is a denial of the tenure upon two accounts; 1st, In admitting the reversion to have been in a stranger to convey; and, 2d, In accepting of it himself, to the prejudice of the person in reversion.

2 Rep. 106. b.

381. If

381. If a tenant for life of a rent or advowson levies a fine, it will have the same effect, for although the fine being levied of a rent passes no more than it lawfully may, yet being a publick and solemn renunciation of the estate for life in a court of record, it is within the reason of the law, and amounts to a forfeiture.

1 Inst. 251. b.
10 Vin. Ab.
374.

382. If *A.* be tenant for life, with remainder to *B.* for life, and *A.* levies a fine to *B.* this is a forfeiture of both their estates; for by their own act on record, they have denied the reversion to be in the lord, the one by giving, and the other by receiving it.

2 Lev. 202.
Smith v.
Abell.
Co. Read. 3:

383. *A.* was tenant for life, remainder for life to *B.* remainder in tail to *C.* remainder in fee to *B.* and *B.* levied a fine *sur cognizance de droit come ceo, &c.* to a stranger. It was adjudged to be a forfeiture of his remainder for life, so that after *A.*'s death, *C.* might enter, because the fine conveyed a fee simple in possession by estoppel, against which he could not aver that he only passed an estate for life in *presenti*, with a fee simple expectant on the death of *C.* without issue; because the fine

Garrett v.
Blizard.
1 Roll. Abr.
855.

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supposes a prior gift in fee simple, which he could not lawfully make while the estate for life of *A.* and the intermediate remainder of *C.* in tail were subsisting.

384. But where the person who has the next estate of inheritance joins with the tenant for life in levying a fine *sur cognizance de droit come ceo, &c.* it does not then operate as a forfeiture.

Bredon's case

1 Rep. 76.

1 Vent. 160.

A. being tenant for life, with remainder in tail to *B.* they both joined in levying a fine *sur cognizance de droit come ceo, &c.* to a stranger in fee. It was resolved that this was neither a discontinuance nor a forfeiture, but that each of the parties to the fine gave that which he might lawfully dispose of, and that the law would construe it to be, first, the grant of the person in remainder, and afterwards the grant of the tenant for life.

Pigott v.

Salisbury.

2 Mod. 109.

385. A fine *sur concessit* levied by a tenant for life, does not operate as a forfeiture of his estate, because it only transfers such an interest as the tenant for life may lawfully pass, without divesting or displacing

placing the estates in remainder or reversion.

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386. No fine levied by a *cestui que trust* will be allowed in Chancery to operate as a forfeiture, because it cannot affect the subsequent remainders; and therefore such a fine will in equity operate at most as a grant of the interest of which the *cestui que trust* has a power to dispose.

2 P. Wms.
146.
3 Atk. 729.

387. If a copyholder levies a fine of his copyhold, it will operate as a forfeiture, and in such case no acceptance of the rent, or other act done by the lord, shall be available to make the estate again good.

Supp. to Co.
Cop. ch. 11.


It is said in a modern case that this doctrine is too general, for unless there is a change of possession the fine will be void as against the lord.

Doe v. Hel-
lier, 3 Term
Rep. B. R.
162.

388. A fine will in general operate as a revocation of a prior devise of the lands whereof the fine is levied, because it is an established maxim, that any alteration of the possession or estate by the act of the devisor, after the publication of a will, amounts to an implied revocation of it,

Revocation of
a Devise.
Roll. Abr.
Tit. Devise
O. p. 3.
3 Will. R. 12.

as

Chap. XII. as such alteration is considered as evidence
 of a change of intention.

389. There are however some alterations in the nature of an estate which do not operate as a revocation of a devise, and where a fine is levied only for the purpose of confirming such an alteration, it will not in that case operate as a revocation.

Luther v.
 Kirby, 8 Vin.
 Ab. p. 148.
 3 P. W. 169.

Dorothy Kirby by her will, taking notice that she was tenant in common with another person, devised her moiety to trustees upon several trusts. She afterwards by indenture between her and the other tenant in common, covenanted to levy a fine of all the premises, and declared the uses thereof as to one moiety to herself and her heirs, and as to the other moiety to the other tenant in common and his heirs, and the fine was levied accordingly.

A question having arisen whether this deed and fine operated as a revocation of the will, the Lord Chancellor referred it to the Judges of the Court of King's Bench, who were unanimously of opinion that they were not a revocation, with which
 the

the Lord Chancellor agreed, and decreed accordingly.

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390. But where a partition is made and a fine is levied, not merely to establish the partition, but also for another purpose, and the estate in the land is altered, it will then operate as a revocation of a former devise.

Robert Tickner being seised in fee of the estate in question, which was held in *Gavelkind*, died intestate, and left two sons, *Henry* and *Robert*, who entered and became seised in *Gavelkind*. *Robert* being seised of an undivided moiety, made his will, and devised it to his wife and her heirs. Afterwards by deed of partition and fine between *Robert* and *Henry*, all the estate which *Robert* had devised was allotted to him, to such uses as he should by deed or writing appoint, and in default of appointment, to him in fee. After mature deliberation, Lord Chief Justice *Lee* held this transaction to be a revocation of *Robert's* will; and Lord *Hardwicke* says of this case, that there was a new conveyance, and it did not rest upon the partition only.

Tickner v. Tickner, cit.
3 Atk. 742.

3 Atk. 745.
750.

391. In

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A fine *sur done grant & render* gives a new estate.
1 Inst. 31. b.

391. In a fine *sur done grant & render*, the cognizee is but an instrument, who has a feisin only for an instant, which is not sufficient to intitle his wife to dower; however this fine operates as a feoffment, and re-enseffment, and gives a new estate. So that if a person, seised of an estate *ex parte materna*, levies a fine *sur done grant & render*, and takes back an estate to himself and his heirs, the nature of the descent is thereby altered, and the estate will thenceforth descend to his heirs *ex parte paterna*.

Price v.
Langford,
1 Show. Rep.
92. Salk. 337.
Carthew 140.
ep. temp.
olt 255.

J. S. being seised of lands *ex parte materna*, he and his wife levied a fine to J. N. and J. D. and they by the same fine granted and rendered the same lands to the use of the said J. S. and his wife and the heirs of their two bodies, remainder to the right heirs of J. S. The husband and wife died without issue, and the question was, whether this remainder descended to the heirs of the part of the mother, or of the part of the father.

It was argued on the one side, that this feisin of the cognizee was merely fictitious; for if the cognizee had a term for years in
the

the land, it would not be merged: that it was like the case of a surrender of a copyhold into the hands of the lord, who was thereby only a mere instrument; therefore that nothing was altered by the fine, but the estate remained as before.

On the other side it was contended, that the cognizee could not render the estate unless he had it in him, and that the grant and render operated as a feoffment and re-enfeoffment.

The Court held that the estate was once in the cognizee, otherwise he could not give it back: that the grant and render was a conveyance at common law, and made the cognizor a new purchaser, as much as a feoffment and re-enfeoffment; so that the remainder descended to the heirs on the part of the father.

It is observable that this is the only sort of fine which gives a new estate; for if a person seised *ex parte materna* levies a fine *sur cognizance de droit come ceo*, and either makes no declaration of the uses of it, or declares it to be to the use of himself and his heirs, the lands will still descend *ex*

1 Salk. 590.
2 P. W. 19.
2 Will. 19.

parte

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parte materna, because it is still the old use, which, consisting in trust and confidence, will follow the nature of the land, and will descend as the land would have descended, if no alteration had been made; and it is totally immaterial whether the use be expressly declared upon a fine, or permitted to arise by implication.

CHAPTER XIII.

What Persons Estates and Interests
are not barred by a Fine.

392. **N**OTWITHSTANDING the great force and effect of a fine, yet there are some particular persons estates and interests, to which its operation does not extend.

By the common law no laches can be imputed to the King, and therefore no delay or omission on his part in making a claim will bar his right: from thence has arisen the maxim, *nullum tempus occurrit regi*, for the law supposes his Majesty to be always busied for the publick good, and therefore that he has not leisure to assert his right within the time prescribed for other persons. It follows from this principle that the King cannot be barred by a fine, to which he is not a party, and five years non-claim; nor is his Majesty's prerogative in this instance taken away by the statute 9 Geo. III. c. 16. by which the King is only disabled to sue for any manors,

C. or XIII.  nors, lands or hereditaments where the right has not accrued to the Crown within sixty years.

*Ecclesiastical
corporations.*

393. Ecclesiastical corporations, and in general all ecclesiastical persons, who are seised in right of their churches only, and have not an absolute estate in their possessions, being restrained from alienation by several positive statutes, are not only prohibited from levying fines, but cannot even bar their successors by their non-claim (a).

*Magdalene
college case.*
11 Rep. 73.
b. 1 Roll.
Rep. 151.
Watf. Comp.
In. 427.

Thus in the case of *Magdalene College*, one of the points was, whether the master and fellows were bound by a fine and five years non-claim; and it was resolved that the right of the college was not barred by the fine and non-claim, for the words of the statute 13 *Eliz. c. 10.* which prohibits all

(a) This agrees with the principles of the old law, as laid down by *Bracton*. *Illud item ut videtur observari deberet de jure et feodo ecclesie, si rector clameum non opposuerit, quod ecclesie non prejudicatur, cum fungatur vice minoris, non magis quam minori si custos clameum non appuerit.* Lib. 5. c. 29. f. 3.

ecclesiastical

ecclesiastical corporations from alienation were "that all leases, gifts, grants, feoffments, conveyances, or estates to be made, had, or suffered by any masters and fellows of any college, &c." So that when a fine was levied and no claim was made for five years, there was a conveyance permitted and suffered by the master and fellows of the college; and it would have been of no effect to have prohibited the master and fellows themselves from making conveyances of their lands, if they were allowed to have a power by their permission and non-claim, to bar their successors. A bishop, dean, or vicar may however be himself barred by his own non-claim, as has been stated in a former chapter.

Howlet v.
Carpenter.
3 Keb. 775.
S. P.

Ante f. 356.

394. It is laid down by Sir *Edward Coke* as a certain principle, that no fine will bar any estate in possession, reversion or remainder, which is not divested and put to a right. This position is however too general, if the words "divested and put to a right" are understood in that strict technical sense which the law annexes to them. The word "divest" signifies nothing more than a mere deprivation of the

Estates not de-
vested.

9 Rep. 106. a.
T. Raym.
149.

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possession (a); but the words, "put to a right," have a much more extensive signification, for they mean, a deprivation not only of the possession, but also of the right of possession; so that where an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property. If therefore Sir *Edward Coke's* position be taken strictly, it will appear to be unsupported by any authority; for although it be necessary that an estate be divested before it be barred by a fine, yet it is by no means necessary that an estate should be put to a right.

Ante f. 368.

Thus in the case of *Stowell v. Zouch*, when *Stowell* was disseised by *Zouch*, his estate was merely divested, that is, he had only lost the actual possession, but it was not turned to a right, for he still continued to have in him both the right of possession and the right of property, and yet all the judges agreed that he was barred by the fine.

(a) *Devest*, *devestire*, is contrary to invest, for as *investire* signifies *possessionem tradere*, so *devestire* means *possessionem auferre*. Cowell's Dict. 1 lib. Feud. tit. 7.

This case, and many others which will be mentioned in the present chapter, clearly prove the general rule to be— That no estate or interest can be barred by a fine unless it is devested out of the real owner, either before the fine is levied, or by the operation of the fine itself, that is, unless the real owner is turned out of possession of such estate or interest, and that while he continues in possession, a fine will not affect him.

395. The case in which this principle was laid down, and Sir *Edward Coke's* expression in stating the resolution of the Court, shews that this was the idea which he annexed to the words "put to a right," for, says he, "he who has the estate or interest
" in him, cannot be put to his action, en-
" try or claim, for he has *that* which the
" action, entry or claim would vest in, or
" give him:" and in another place he states this principle in the following words:
" No fine levied with proclamations shall
" bind any but those who are put out of
" possession, and have but a right, for if
" their estate or interest be not devested
" out of them, but remains in them as it
" was *ab initio*, they need not make an

9 Rep. 106. a.

5 Rep. 123. b.
2 Inst. 517.

Chap. XIII. { “ entry or claim to that which never was
“ devested.”

These passages fully prove Sir *Edward Coke*'s meaning to have been, that no person could be barred by a fine, unless he was first turned out of possession, and had only a right of entry or action left in him; for if a person continued in possession, after a fine had been levied, he could be under no necessity of making his claim or bringing his action; because being still in possession, and not disturbed by the fine, he had already all the advantages which those remedies could procure him, and therefore it would be unnecessary to pursue them.

396. It follows from this principle, that a future right cannot be barred by a fine; because a person cannot be dispossessed of it.

Ante f. 323.
5 Rep. 124. b.

Thus, in *Saffin's* case, it was agreed, that although a term for years might be barred by a fine, if the lessee were, or might have been in possession, yet that so long as a lessee for years had only an *interesse termini*, he was not affected by a fine; because a man cannot be dispossessed of an *interesse termini*.

termini. But when his term commenced, and he acquired a right to enter on the land, he then had such a present estate as might be divested, and which he might re-vest by his entry; so that his non-claim for five years after the commencement of his term, barred him; because from that time he was out of possession.

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So in the case of *Corbett v. Stone*, a term for years was adjudged not to be barred by a fine, because the person in whom it was vested was not dispossessed of it.

Ante f. 326.

397. A man settled lands to the use of himself for life, and if he should settle a jointure on his wife, and make a lease for thirty-one years, to commence after his death, that then the trustees should stand seised to such uses. He made a lease accordingly, and then he and his wife levied a fine. It was resolved that the lease was not barred, because being a future interest, it was not divested or displaced by the fine.

Edwards v. Slater, Hard. 410.

398. The interest of tenants by statute-merchant, statute-staple, or elegit, cannot be barred by a fine until they have extend-

1 Mod. 217.
Ante f. 328.

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ed the lands, or pursued their rights in some other manner; for until then, they have no right to enter on the lands, and therefore cannot be put out of possession.

1 Cha. C2.

263.

1 Freem. 211.

399. So where a man has a judgment for debt, and the debtor before execution aliens by fine, and five years pass, yet the creditor may still sue out execution.

*A rent, right
of way, and
common.*

5 Rep. 124. a.

Bro. Ab. tit.

Fine pl. 123.

Shep. T. 22.

Cro. Jac. 60.

T. Raym.

149.

1 Freem. 312.

400. Although the owner of a rent may bar it by a fine, yet a rent in the possession of a third person cannot be so barred. It is the same of a right of way, or common; because these being merely contingent rights, collateral to and issuing out of lands, they cannot be divested; for although a person who has a rent, right of way, or common, out of lands, be not in the actual enjoyment of them, yet by *non-user* alone, he does not cease to have a vested estate or interest therein, so that he still continues to be in actual possession; such things being mere creatures of the law, and owing their existence to the construction thereof, they are always considered to be in the possession of those whom the law adjudges to have a right to such possession,

Hawk. P. C.

ch. 64. f. 45.

It should however be observed, that a rent may be devised by a disseisin; the different modes by which a man might be disseised of a rent, are very accurately explained by *Littleton*, because when he wrote, an assise was, in most cases, the only remedy for the recovery of a rent, and it only lay where the party was disseised; but disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the sake of more easily trying the right, is pleased to suppose himself disseised; for as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament.

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Littleton,
c. 237 to 240.

10 Rep. 97. a.
3 Comm. 170.

401. These principles have been recently confirmed by the Court of King's Bench, in their determination of the following case.

In an ejectment for lands in *Surry*, the jury found a verdict for the plaintiff, subject to the opinion of the Court on the following case.

Mich. 23 G.
3. Goodright
et. dem.
Hare v.
Board &
Jones, M. S.

Lord *Bolingbroke*, being seised in fee of the premises in question, by indenture of lease, dated the 1st *March* 1765, demised

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the same to *William Stevens* for twenty-one years, at the rent of 100 *l.* which lease, by mesne assignments, became vested in the defendant *Board*. Lord *Bolingbroke*, by a bond dated 24th *July* 1770, with warrant of attorney to confess judgment, in consideration of 3000 *l.* became bound to the lessee of the plaintiff in the penal sum of 6000 *l.* conditioned for the payment to her of an annuity of 500 *l.* during his own life; and by indenture of the same date, Lord *Bolingbroke*, in consideration of the said 3000 *l.* and as a farther security for the annuity, demised the premises in question to the lessor of the plaintiff for ninety-nine years, if his Lordship should so long live, at a pepper-corn rent, with a proviso, that the lessor of the plaintiff should the next day re-demise the premises to Lord *Bolingbroke* for ninety-eight years and eleven months, if he should so long live, at the rent of 500 *l.* which was accordingly done.

Lord *Bolingbroke*, by lease and release dated the 9th and 10th *March* 1773, conveyed the premises, for a fair and valuable consideration, to the defendant *Jones* in fee,
 who

who had no notice of the annuity granted to the lessor of the plaintiff. Chap. XIII.

Jones being in possession, levied a fine of the premises, with proclamation in *Trinity Term* in 1775, to the use of himself in fee.

The annuity was in arrear from the 24th *January* 1774, and the ejectment was brought in *Hilary Term* 1782.

Lord *Mansfield*.—We have looked into all the cases, and have no doubt. It appears that the lessor of the plaintiff, and the defendant *Jones*, are both innocent; *Jones* is a purchaser for a valuable consideration, without any notice of the lessor of the plaintiff's title; the lessor of the plaintiff is not alleged at any time to have known of the conveyance to *Jones*, and there was no circumstance of notoriety attending the transfer to give her such notice; for the visible possession continued the same after the sale as before it; the lease to *William Stevens* subsisting, and the payment of rent to *Jones*, instead of Lord *Bolingbroke*, carried with it no notoriety in the country. At the time of the conveyance,



ance, there was no arrear of interest due to Mrs. *Hare*, and therefore she had no right to come upon the land in any shape. If she was guilty of laches afterwards, there could be no *mala fides* in it with respect to *Jones*, as he is under no disadvantage from it: so that it is a question of mere law between two innocent parties, whether the right and interest of the lessor of the plaintiff is barred by the fine and non-claim. This depends on one clear proposition, which is a general rule of law founded in good sense; and although it be difficult to find a rule without an exception, yet I know of none to this proposition. It is laid down in 9 *Co. Rep.* 106. a. “Resolved *per totam Curiam*, that no fine nor “warranty shall bar any estate in possession, reversion or remainder, which is not “divested and put to a right.” This general rule is illustrated and applied to several cases throughout the books; and hence it follows, that no collateral interest can be barred by a fine; as a rent-charge, a right of common, &c. and the authority cited from *Carter* 24. that a rent-charge may be barred by a fine, is totally mistaken; for, in looking into it, it appears to be thus; the owner of a rent-charge
levied

levied a fine of the land ; the question was, whether the rent-charge passed by the fine ; and a distinction was taken between a fine operating as a grant or as a bar. Here the fine operated as a grant, and not as a bar ; the rule is universal, that a rent-charge in a third person is not barred by a fine and non-claim. Hence the parties to a fine, or one of them, must be in of a seisin or possession adverse to that interest which is to be barred ; for, if it be consistent with it, the fine does not divest it, and therefore is no bar. Now, at the time of the conveyance to *Jones* in 1773, Lord *Bolingbroke* had no adverse possession ; he had paid all arrears, and as the lessor of the plaintiff had no right to come on the land but for arrears, she had then no title in her. At the time when the fine was levied, there was an arrear of a year and an half due ; but the lessor of the plaintiff was not bound to resort to the lands for her remedy, she had other securities ; besides, she could not enter on the lands, the lessee for years being in possession ; all she could do was by notice to the tenant under the statute 4 & 5 Ann c. 16. which makes attornment unnecessary, either to distrain or bring an action for the
rent.

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rent. In every shape it is most clear, that the lessor of the plaintiff's interest was not divested or turned to a right; and therefore that it remained after the fine just as it did before. Judgment was given for the lessor of the plaintiff.

Gilb. Ten.
104.

The doctrine, that a rent cannot be divested, seems to extend to the case of a rent in the possession of a person who has no title to it; for it is said by Lord Chief Baron *Gilbert*, that if *A.* is seised of a rent-charge, and the tenant of the land pays it to *B.* this does not divest *A.* of his right, because the wrongful payment of the tenant cannot alter the right of the owner; it is therefore a payment in his own wrong, and it still remains in arrear. This seems the strongest case that can be put on the subject.

*Necessity of an
adverse posses-
sion.*

402. It is not only necessary that a person should be out of possession to be affected by a fine, but it is also requisite that the party levying the fine should have an adverse possession inconsistent with that of the person to be barred; so that if the possession of the party who levies a fine is consistent with that of any other person, such

such other person will not be affected by it. Chap. XIII.

Thus, it has been settled, that the possession of one joint-tenant is the possession of the other, so as to prevent the effect of the statute of Limitations, and that where there are two joint-tenants in fee, if one of them levies a fine of the whole, it does not amount to an ouster of his companion, but only severs the jointure, though he is in of the old use again.

Ford v. Lord Grey,
6 Mod. 44.
Salk. 285.

403. The possession of one tenant in common is the possession of the other, nor does the bare perception of all the rents and profits by one, amount to an ouster of the other, so as to make him liable to be barred by the statute of Limitations.

Thus where one tenant in common received all the rents for 26 years, and in an ejectment brought by the other tenant in common for the recovery of his moiety, the only question was, Whether the plaintiff was barred from recovering by the statute of Limitations. It was said on behalf of the plaintiff that the statute of Limitations only runs against those who are

Fairclaim v. Shackleton,
5 Burr.
2604.

out

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out of possession; that coparceners, joint-tenants, and tenants in common have a joint possession, and the possession of one is the possession of both; that the perception of the profits does not amount to an expulsion; one tenant in common may indeed disseise another, but then it must be done by an actual disseisin, and not by a bare perception of the profits only, and the statute of Limitations never runs against a man but where he is actually ousted or disseised. The Court laid it down that there must be an adverse possession in order to enable the statute of Limitations to run; that there must be a disseisin strictly proved; that in this case there was no adverse possession, no keeping the plaintiff out of possession; one tenant in common had received the rent without accounting for it to the other; but there was no expulsion, no ouster. Judgment was therefore given for the plaintiff.

404. Notwithstanding the doctrine established in the preceding case, it has since been determined that 36 years sole and uninterrupted possession by one tenant in common, without any account, or demand made, or claim set up by his companion,

panion, was a sufficient ground for a jury to *presume* an actual ouster of the co-tenant.

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Upon a rule to shew cause why a new trial should not be granted, Lord *Mansfield* reported that from the year 1734 one tenant in common had been in the sole possession of the lands without any claim or demand, by any person or persons claiming under the other tenant in common; that no actual ouster was proved: but upon the circumstances his Lordship had left it to the jury to say, Whether there was not sufficient evidence before them to presume an actual ouster, and supposing there was an actual ouster, in that case, the lessors of the plaintiff were barred by the statute of Limitations. The jury found that there was sufficient evidence to presume an actual ouster.

Doe v.
Proffer,
Cowp. 217.

After the case had been argued, Lord *Mansfield* said, " It is very true that I told
" the jury they were warranted by the
" length of time in this case, to presume
" an *adverse* possession and *ouster* by one of
" the tenants in common of his compa-
" nion; and I continue still of the same
" opinion.

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“ opinion. Some ambiguity seems to
 “ have arisen from the term *actual ouster*,
 “ as if it meant some act accompanied by
 “ real force, and as if a turning out by the
 “ shoulders were necessary. But that is
 “ not so, a man may come in by a right-
 “ ful possession, and yet hold over adverse-
 “ ly without a title. If he does, such
 “ holding over, under circumstances, will
 “ be equivalent to an *actual ouster*. For
 “ instance, length of possession during a
 “ particular estate, as a term of 1000
 “ years, or under a lease for lives, as long
 “ as the lives are in being, gives no title.
 “ But if tenant *pur autre vie* hold over for
 “ 20 years after the death of *cestui que vie*,
 “ such holding over will in ejectment be
 “ a complete bar to the remainder-man or
 “ reversioner; because it was *adverse* to
 “ his title. So in the case of tenants in
 “ common, the possession of one tenant in
 “ common, *eo nomine*, as tenant in com-
 “ mon, can never bar his companion;
 “ because such possession is not adverse to
 “ the right of his companion, but in sup-
 “ port of their common title; and by pay-
 “ ing him his share, he acknowledges him
 “ co-tenant. Nor indeed is a *refusal* to
 “ pay of itself sufficient, *without denying his*
 “ title.

“ *title*. But if upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough.”

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The Court was of opinion, that an undisturbed and quiet possession for such a length of time was a sufficient ground for the jury to presume an actual ouster, and therefore the rule for a new trial was discharged.

405. It is said by Sir *Edward Coke*, that when one co-parcener enters claiming the whole land and taking the whole profits, she gains the moiety of her sister by abatement, which is thereby devested, and yet her dying seised will not take away the entry of her sister; that when one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of them both, and will not devest the moiety of her sister; but if both co-parceners enter, the taking of the whole profits, or any claim made by the one cannot put the other out of possession without an actual putting out or disseisin; from which it

1 Inst. 243

b.

Id. 373. b

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follows, that if one co-parcener enters generally, and takes the whole profits, and afterwards levies a fine of the whole, such fine will not bar her companion, because there was no ouster, and of consequence no adverse possession: for there is a strict analogy between the effect of the statute of Limitations, and that of the statute of 4 Hen. VII. in this respect: both these statutes enact that a non-claim during a certain period of time, is a complete bar to those who are out of possession, that is, to those who are either ousted or disseised, but with respect to such persons who are in actual possession, or whose possession is preserved by the possession of some other person on account of a privity of estate, they are not barred.

406. This doctrine, however, is not supported by any adjudged case respecting the fine of one co-parcener, but the rule laid down by the Court in the case of *Ford v. Lord Grey*, that the fine of one joint-tenant does not amount to an ouster of his companion, seems to be a sufficient authority for concluding that the fine of one tenant in common, or one co-parcener, would

Ante f. 402.

would not be considered as a bar to his or her companion, as the principle is precisely the same in all those cases, unless there were acts of ownership from which an actual ouster might reasonably be presumed.

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In a writ of error from the Court of King's Bench in *Ireland*, the case was, that *Maurice Tyrrell* being a Roman Catholic, died seised of certain lands, leaving two sons, *Richard* and *James*. By the *Irish* statute 2 *Anne*, estates in fee-simple, or fee-tail, belonging to Roman Catholics, descended in gavelkind, but on the death of *Maurice*, his eldest son, *Richard* entered alone, and held the same until his death, for 62 years, and in the mean time settled the same by fine and recovery, to which *James* his brother was privy. On the death of *Richard*, in 1766, leaving two daughters, *James* the lessor of the plaintiff brought an ejectment against his two nieces, for two thirds of the moiety of the lands whereof his brother died seised, as co-heir in gavelkind with his brother, and recovered them by default. He then brought an ejectment against the widow of *Richard* for the other third of the moiety,

Davenport
v. Tyrell,
1 Bl. Rep.
675.

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which she claimed as her dower, and also under the settlement. On the trial the Judge directed the jury to find a verdict for the plaintiff, upon which a bill of exceptions was rendered setting out in substance this case, which was returned into the King's Bench in *Ireland*, and thereupon the Court gave judgment for the defendant. A writ of error was then brought in the King's Bench at *Westminster*, and it was argued for the defendant that 62 years sole possession, and the fine were a bar to this action by common law: that this was a question not between joint-tenants, or tenants in common, but tenants in gavelkind, who are male co-parceners; that the true state of the law was this, 1. If both enter there must be an actual ouster, to make a disseisin; 2. If one enters generally, and takes the profits, this is no disseisin; 3. If one enters *especially*, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin; but after her death the sister may enter, unless barred by the statute of Limitations. 4. If after a special entry, one by feoffment or fine, destroys the co-parcenary, and takes back an estate in fee and dies, the entry of the

the sister is barred. Here *Richard* entered alone in 1704, took the whole profits, settled the estate in 1727, with the privity of *James*, levied a fine, and died after 62 years possession. The entry of *James* is therefore clearly barred, and he cannot maintain an ejectment. The Court said, that the statute 2 *Anne*, made the lands of Roman Catholics descend in gavelkind, that was it's whole effect, and then the adverse possession of one gavelkind tenant, would not operate as the possession of both. That was a qualified rule, and in the present case the acts of ownership, fine, &c. made an actual ouster, the statute of Limitations operated as an extinguishment of the remedy of the one, and not as giving the estate to the other.

407. It is impossible from these cases to deduce any certain rule respecting the operation of fines levied by joint-tenants, tenants in common, or co-parceners; for if we adopt the principle laid down by Sir *Edward Coke*, no fine levied by a joint-tenant, &c. will bar his companion, unless it be proved that such joint-tenant entered specially, claiming the whole; a fact not easily ascertainable, and which can only be

1 Atk. 631.

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1 Inst. 374.
a.

decided by a jury. But there is another passage in *Coke's Comment on Littleton*, where it is said that "when one co-parcener entereth into the whole, and maketh a feoffment of the whole, this devesteth the freehold in law, out of the other co-parcener." Now a fine where one of the parties to it has an estate of freehold has certainly as powerful an operation in devesting an estate, as a feoffment; and if this rule be adopted, it will follow, that a fine levied by one joint-tenant, &c. will devest the estate of his companion, and of consequence bar it, unless a claim is made in due time. A distinction may however be made between a fine levied of the whole estate by one joint-tenant, &c. without any declaration of use, and a fine levied of the whole estate by one joint-tenant, &c. for the purpose of conveying it to a purchaser. In the first case it may be presumed that the joint-tenant, &c. only levied the fine in order to strengthen his own and his companion's title, but in the second case, the act of levying the fine is sufficient evidence of an intention of claiming the whole profits, and therefore the possession must necessarily become adverse from the time when such

such a fine is levied. And even in the case where both the joint-tenants, &c. have entered and been seised, the levying a fine by one of them to a stranger, of the whole estate, seems to amount to an actual putting out.

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1 Atk. 632.

408. When fines became common assurances of lands, the Judges would no more allow a fine to divest the interest of the king, than any other conveyance, but preserved the king's remainder or reversion, altho' they allowed the fine to be a good bar to the estate tail, on which the king's remainder or reversion depended, for otherwise an estate-tail, with a remainder or reversion in his majesty would have been unalienable; and if a fine was levied of an estate of this kind, it only passed a base fee, determinable on failure of heirs of the body of the tenant in tail.

Estates tail of the gift of the crown.

But by a clause in the statute 32 Hen. 8. c. 36. §. 4. it was provided that "that statute should not extend to any fine levied by any person or persons, of any manors, lands, tenements, or hereditaments before the time of levying the same fine, given, granted or assigned to

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“ the said person or persons so levying the
 “ same fine, or to any of his or their an-
 “ cestors in tail, or by virtue of any let-
 “ ters patent of the king, or any of his
 “ progenitors, or by virtue of any act or
 “ acts of Parliament, the reversion where-
 “ of at the time of the said fine or fines so
 “ levied, being in the king, his heirs or
 “ successors: but that every such fine and
 “ fines, should be of like force, strength
 “ and effect, as they were or should
 “ have been if that act had never been had
 “ or made.”

In consequence of this proviso the operation of fines levied by tenants in tail, where there was a remainder or reversion in the crown, depended on the statute 4 *Hen.* 7. and it was much doubted whether the issue in tail were barred or not. But on account of a statute made two years after, 34 & 35 *Hen.* 8. c. 20. it was resolved that no fine, levied by a tenant in tail, of the king's gift, &c. where there was a remainder or reversion in the crown, should operate as a bar to the issue in tail or should affect the remainder or reversion which was in the crown.

With

a. tail. 372.

b.

T. Raym.

249.

Sir T. Jones

252.

With respect to the construction of the statute 34 & 35 Hen. VIII. and the cases which have been determined on it, they will be stated in the Essay on Recoveries.

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409. A springing or shifting use cannot be defeated or destroyed by a fine levied of the estate out of which such springing or shifting use is to arise, unless there be a non-claim of five years after it arises.

*Springing and
shifting uses.*

Mary and Penelope Tannott being seized in fee as co-heirs, in consideration of 4000*l.* paid to *Mary* by *Richard Carew*, and of a marriage, which soon afterwards took place between *Penelope* and *Richard Carew*; the said *Mary* and *Penelope* conveyed all their estates to trustees and their heirs, to the use of *Richard Carew* for life, remainder to *Penelope* for life for her jointure, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *Richard* and *Penelope* in tail male successively, remainder to the daughters in tail, with the ultimate remainder to the said *Richard Carew* and his heirs for ever. Subject to a proviso, that if it should happen that no issue of the said *Richard* by the said *Penelope* should be living

Lloyd v.
Carew,
Show. Cases
in Parl. 137.

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living at the decease of the survivor of them, and the heirs of the said *Penelope* should, within twelve months after the decease of the survivor of the said *Richard* and *Penelope*, dying without issue as aforesaid pay to the heirs or assigns of the said *Richard Carew* the sum of 4000*l.* that then the remainder in fee simple so limited to the said *Richard Carew* and his heirs should cease, and that then and from thenceforth the premises should remain to the use of the right heirs of the said *Penelope* for ever. Afterwards *Richard Carew* and *Penelope* his wife, in order to extinguish and destroy all such right as the heirs of *Penelope* might have under this proviso, and for settling the same on the said *Richard Carew* and his heirs, levied a fine of all the estate, and declared the uses thereof to *Richard Carew* for life, remainder to *Penelope* for life, remainder to *Richard Carew* in fee. *Richard Carew* died without issue, upon which the heirs of *Mary* claimed the estate under the proviso, and filed their bill in chancery, to compel the trustees to convey the estate to them, on payment of the 4000*l.* The bill was dismissed; but upon an appeal to the House of Lords, the decree of dismissal was reversed, it being alledged that this proviso

proviso was within the same reason with those limitations which were allowed in the Duke of *Norfolk's* case, where it is said that future interests, springing trusts, or trusts executory, and remainders to arise upon future contingencies, are quite out of the rule and reason of perpetuities, if they are not of remote consideration, but such as will speedily wear out. And that the fine could not bar the benefit of this proviso, because the same never was, nor could be in *Penelope*, who levied the fine.

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410. Fines seem formerly to have been in some instances levied of dignities and titles of honour, but in the case of Lord Viscount *Purbeck*, it was debated in the House of Lords, whether the dignity of a viscount could be surrendered to the king by a fine. And the House of Lords after long debate, and having heard his Majesty's Attorney General, were unanimously of opinion that no fine levied to the king can bar a peer's title of honour, or the right of any person claiming such title under a person levying such a fine.

A title of honour.

Show. Ca. in
Parl. 1.
Collins's
Claims of
Baronies
293.
1 Inst. 20. a.
n. 3.

18th of June,
1673.

CHAPTER XIV.

How Fines may be reversed and avoided.

Writ of error. 411. **A** Fine being considered as a judgment given in a Court of Record, it can only be reversed by writ of error, which is also a matter of record, being a commission to judges of a superior court, authorising them to examine the record upon which a judgment was given, and on such examination to affirm or reverse the same according to law. *Inter est reipublica res judicatas non rescindi, et nihil est tam conveniens naturali equitati, quam, unumquodque dissolvi, eo legamine quo ligatum est.*

2 T.R. 260.2

412. During the term in which a judicial act is done, the record may be amended or invalidated, without a writ of error; because during the Term the record is in the breast of the Court, and the rolls are alterable at the discretion of the Judges; and now the courts of justice allow amendments to be made at any time while the

1 Comm 407

suit

suit is depending, notwithstanding the record be made up, and the Term be past; for they consider the proceedings as *in fieri* until the judgment is given; so that a fine may now be amended or invalidated at any time during the Term in which it is levied, by an application to the Court of Common Pleas.

413. A writ of error is properly speaking a proceeding in the nature of an appeal, and therefore must be brought in a superior court; so that a writ of error to reverse a fine is usually brought in the Court of King's Bench, because that Court has an appellant jurisdiction over the Court of Common Pleas. But where the error assigned in a judgment does not arise from any fault in the Court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same Court in which the judgment was given. And therefore in cases of this kind, a writ of error to reverse a fine must be brought in the Court of Common Pleas.

9 Vin. Ab.
486.
Fitz. N. B.
21.

414. With respect to fines levied before the Justices of *Wales*, pursuant to the statute

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tute 34 & 35 *Hen. VIII.* It is provided by that statute, *f. 113.* that all errors therein shall be redressed by writ of error, to be sued out of the King's Chancery in *England*, returnable before the King's Justices of his Bench in *England*. And by the stat. 43 *Eliz. c. 15. f. 6.* it is provided that all fines levied in the county of the city of *Chester* pursuant to that act, shall be subject to be reversed upon writs of error to be sued and prosecuted before the High Justice of the County Palatine of *Chester*, as other judgments given in the Portmoot Court.

*Who may bring
a writ of error.
2 Bac. Ab.
537.*

415. With respect to the persons who may bring a writ of error, it should be premised, that no person has a right to reverse a fine, unless he can shew that upon such reversal he will be intitled to the land; for the courts of law will not dispossess the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title, until the contrary appears. Besides, if the person who demands the reversal of the fine, cannot prove that he has a title to the lands of which the fine was levied, it follows that he is not affected by it; and it would be trifling with courts of justice,
for

for a person to seek relief, who cannot make it appear that he has received an injury.

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416. The person therefore intitled to a writ of error to reverse a fine, is he who would have been intitled to the lands if the fine had not been levied, which in general is the heir at law; but where one who is seised *ex parte materna*, levies a fine in which there is error, the heir *ex parte materna* will be intitled to the writ of error.

Dyer 90. a.

1 Leon. 261.

The younger son, when intitled to the lands by the custom of Borough *English*, shall have the writ of error, and not the heir at common law, for this remedy descends with the land.


Idem.

A brother of the half blood however is not intitled to bring a writ of error on a fine levied by his elder brother, though if there had not been such fine the land would have descended to him.

1 Inst. 14. a.
n. 6.

417. In a writ of error to reverse a fine, it is not requisite that the person who brings the writ should deduce his title and pedigree,

Champernoon v. Godolphin, Cro. Jac. 150.

Chap. XIV.  gree, unless it be a special case varying from the common course, as where a writ of error is brought by a special heir in tail, or a person in remainder.

9 Vin. Ab. 493. 418. All those who are parties to a fine must in general join with the person intitled to the land in reversing it, but this rule admits of some exceptions.

Piggot v. Harrington, Cro. Eliz. 115. Husband and wife were tenants for life, with remainder to an infant in fee, and they all joined in levying a fine. The infant alone brought a writ of error to reverse it, on account of his nonage. It was objected, that since all had joined in the fine, they should likewise join in the writ of error: that the husband and wife should be summoned and served, and then the infant alone might proceed to assign errors. But it was adjudged that the writ of error was well brought by the infant alone, because the error assigned was not in the record, but without it, *viz.* in the person of the infant.

5 Rep. 39. b. 419. No person can have a writ of error to reverse a fine, who took any estate by it, because no recoveror can bring a writ of error

error to defeat a record, by which he himself has recovered; for the judgment in a writ of error is to avoid that which the plaintiff has lost.

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It follows from this principle, that in a *fine sur done grant & render*, the cognizor cannot assign error in the *grant & render*, by which he himself has taken an estate.

Idem.

420. A writ of error to reverse a fine, must be brought against some one of those who were parties or privies to it, and not against the tenant of the land only. But the Court will not in general reverse a fine unless a *scire facias* is returned against the persons who are then in possession; for the cognizees of a fine are frequently nothing more than trustees, and have no beneficial interest in the lands.

1 Salk. 339;
Rep. temp.
Holt, 614.

421. Although it is a rule that in actions for the recovery of dower, the parol shall not demur on account of the infancy of the heir; yet if a man and his wife levy a fine, and after the husband's death the wife brings a writ of error to reverse it, in order

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 his infancy, and the parol shall demur.

Herbert v.
 Binion, Cro.
 Jac. 392.

In error to reverse a fine levied by the plaintiff and her husband, the heir being summoned as terre-tenant, appeared and pleaded that he was within age, and prayed that the parol might demur. The plaintiff counter-pleaded the age, shewing that she was intitled to have dower before the fine levied, and was now barred of dower by the fine which was erroneous, and set forth the errors. Upon demurrer and solemn argument it was adjudged that the parol should demur, and that the plaintiff should not have the advantage to take from the defendant his age, having by the fine, so long as it stood in force, barred herself of her dower; and therefore the law will rather favour the infant, whose privilege was immediate, than the plaintiffs, which was only mediate, after the fine was reversed.

422. Errors may be assigned either in fact, as that the cognizor to a fine was an infant; or else in law, that is, on account of some defect appearing on the face of the record. But nothing can be assigned for error

1 Roll. Ab.
 757.
 Ante f. 67.

error in fact, in a fine which contradicts the record, because the records of a court of justice are of so great credit that they can only be defeated by matters of equal notoriety with themselves; and therefore although the circumstances assigned for error, should be proved by witnesses of the greatest credit, yet such evidence cannot be admitted.

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Thus we have seen that where the entry of the king's silver before the death of the cognizor, appears upon record, no averment against it can be made.


Ante f. 34.

423. No averment can be made that the cognizor of a fine died before the *teste* of the writ of *dedimus potestatem*, when it appears by the certificate of the concord that he was alive, for this contradicts the record. But an averment of the death of the cognizor generally, before the engrossment, entry and recording of the king's silver, is admissible.

Dyer 89. b.

424. Where a fine is acknowledged in court, the plaintiff in error cannot assign for error that the cognizor died before the return of the writ of covenant, for that would

Wright v.
Mayor of
Wickham,
Cro. Eliz.
468.

Chap. XIV.  directly contradict the record, because no fine is ever acknowledged in court, until the writ of covenant is returned, for until then the parties are not before the court. But if the fine is acknowledged before commissioners, it may then be averred, that the cognizor died before the return of the writ of covenant, or that after the acknowledgement, and before the return of the certificate thereof, the cognizor died; because these facts are consistent with the record.

Clements v.
Langharne,
ante.

Arundel v.
Arundel.
Cro. Eliz.
657.

425. A fine was acknowledged before Roger Manwood, Esq; one of the Justices of the Common Pleas, and afterwards a writ of *dedimus potestatem* was directed to Sir Roger Manwood, (he having been knighted after the fine was acknowledged) who returned it with his name and title: this circumstance was assigned for error, but it was not allowed because it contradicted the record, by which it appeared that the writ of *dedimus potestatem* was directed to Sir Roger Manwood, who by virtue thereof took the acknowledgment.

10 Vin. Ab.
15.

426. A person may bar himself from bringing a writ of error in several ways; thus

thus if a man releases all his right in, or makes a feoffment of, the land whereof a fine has been levied, he will be thereby barred from bringing a writ of error, because by his release or feoffment, he has for ever excluded himself from the land, and no person can have a writ of error who is not intitled to the land. But if a person releases his right in, or makes a feoffment of, part of the land, he may still reverse the fine as to the remainder.

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427. If an infant brings a writ of error to reverse a fine levied by him during his infancy, and on inspection his nonage is recorded by the Court, but before the fine is reversed, he levies another fine, the second fine will prevent him from reversing the first, because the second fine having entirely barred him of all right to the lands, must also deprive him of all remedies to recover them.

Hart's case,
10 Vin. Ab.
16.

428. In a writ of error to reverse a fine, the defendant cannot plead in bar the same fine which is attempted to be reversed, and five years non-claim, *quia non valet exceptio istius rei cujus petitur dissolutio*.

Cockman v.
Farrer,
T. Raym.
461.
T. Jones 181

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 Barton v. Le-
 ver & Brown-
 low, Cro.Eliz.
 388.

429. A common recovery will bar the issue in tail from bringing a writ of error to reverse a fine levied by his ancestor, because the estate tail being barred by the recovery, the issue in tail has no title to the land.

Fazakerly v.
 Baldo, Salk.
 341. 13 Vin.
 Ab. 338.

430. The manner of reversing fines differs from that which is observed in reversing other judgments, for in those cases the record itself is removed into the court in which the writ of error is brought, because in adversary suits, errors cannot be assigned on a transcript of a record only: but in cases of fines, nothing more than the transcript is removed, on which the errors are assigned; and if the fine is erroneous, the Court of King's Bench may send for the record itself and reverse it, or else send a writ to the treasurer or chamberlain of the Court of Common Pleas to take it off the file.

¹ Rep. 76. b.
¹ Roll. R. 11.
³ Lev. 36.

431. It is said by Sir *Edward Coke* and others, that if there be tenant for life, remainder in fee to an infant, and they both join in levying a fine, which is afterwards reversed by the person in remainder on account of his infancy, yet that the cognizee shall

shall have the lands, during the life of the tenant for life. But in the case of *Zouch v. Thompson* it was adjudged, that although a fine might be reversed as to part of the lands and remain good as to the residue, yet that a fine could not be reversed *in toto* as to one person, and remain good *in toto* as to another.

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1 *Ld. Raym.*
179.

432. By the statute 23 *Eliz. c. 3. s. 2.* it is enacted, "That no fine shall be reversed for false or incongruous Latin, rasure, interlining, mis-entering of any proclamations, mis-returning or not returning of the Sheriff, or want of form in words and not in substance."

By the statute 10 & 11 *W. 3. c. 14.* a writ of error to reverse a fine must be brought and prosecuted within 20 years after such fine levied.

Vide Recoveries, c. 14.

433. A writ of error can only be brought to reverse a judgment in a court of record; for to amend errors in a base court, which is not of record, a writ of false judgment lies, returnable in the Court of Common Pleas.

Writ of false judgment.

1 *Inst.* 288. b.
13 *Vin. Ab.*
105.

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Writ of deceit.
 Fitz. N. B.
 93. 2 Inst.
 216 Rex v.
 Mead, 2 Willf.
 R. 17. Com.
 R. 126.

434. Where a fine is levied in the Court of Common Pleas, of lands held in antient demesne, the lord may reverse it by writ of deceit; and such writ may be brought by the lord against the parties to the fine and the *cestui que use*, by means of which he shall obtain judgment not only for damages (which are usually remitted) but also to recover his court and jurisdiction over the lands, and to annul the former proceedings.

9 Vin. Ab.
 582.
 Anon. 1.
 Leon. 290.

435. If a fine be levied of lands, whereof part are held in antient demesne, and part frank fee, and the lord in antient demesne brings his writ of deceit; the Court of King's Bench, upon a view of the transcript of the record, and proof that part of the lands are antient demesne, will reverse the fine as to that part. They will not however order the fine to be taken off the file, as in cases where the whole fine is reversed, because it will remain good, as to the lands which are frank fee, but will order a mark to be made on the fine, to shew that it is cancelled, as to the lands held in antient demesne.

.436. The

436. The lord of a manor held in antient demesne is not barred of his writ of deceit, by the death of any of the parties to the fine.

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A writ of deceit was brought by the lord of a manor held in antient demesne, to avoid a fine levied of lands held of him as of the said manor. It was argued for the defendant, that the cognizor and the cognizee being both dead, the lord could not now maintain an action of deceit, because it was only a personal action, and therefore died with the person. But it was resolved that a writ of deceit did lie in such a case against the heir of the cognizor or cognizee, because it was a real deceit, and did not resemble the personal deceit of non-summons; and if the law were otherwise, the lord of a manor held in antient demesne would be for ever barred of his right of inheritance, in case the parties to such a fine should happen to die the day after it was levied.

Zouch v. Thompson,
1 Ld. Raym.
177.

437. Where a fine levied in the Court of Common Pleas, of lands held in antient demesne, is reversed by writ of deceit, it is said to be doubtful whether the fine shall

1 Bac. Ab.
112.
Cro. Eliz.
471.

still

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still hold good between the parties. Some say it does not become entirely void, nor is the cognizor restored to his land against his own solemn acknowledgment on record; especially since the lord who brings the writ of deceit seeks nothing more than to restore the land to the privileges of ancient demesne. Others hold that the writ of deceit, and the reversal thereon, entirely avoids the fine, and restores the cognizor to the possession of the land, for the cognizance though on record shall be no estoppel, because it was made in a court which had no jurisdiction, and therefore the whole proceedings were *coram non judice*.

Motion.

2 Show. Rep.

281.

438. In some cases the Court of Common Pleas will vacate and set aside a fine upon motion, although the king's silver has been paid, and the fine completed, without putting the parties to the trouble and expence of a writ of error; in the same manner as they would set aside a judgment obtained by trick or surprise.

Hutchinson's
case, 2 Lev.
36.

Thus where it evidently appeared to the Court, that a husband had prevailed on his wife to levy a fine, she being but sixteen years old; the fine was vacated, and the

the exemplification brought into court and delivered up; the commissioners were also ordered to be prosecuted.

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Watts v. Birkett, ante.

439. Although a fine can only be reversed by a writ of error, yet its effects may be avoided in several other ways.

Modes of avoiding the effects of a fine.

There were four modes of avoiding a fine at common law, two by matters of record, and two by acts *in pais*. Those by matter of record were, a real action commenced within a year and a day after the fine was levied; and an entry of a claim on the record of the foot of the fine itself, in this manner, *talis venit et apponit clamorem suum*. Those by acts *in pais* were, a lawful entry upon the land by the person who had a right; and in case that could not be done, then a continual claim.


Plowd. 359.
2 Inst. 518.
2 Blackst.
Rep. 994.

440. By the statute 4 Hen. 7. all those who are affected by a fine, must pursue their title by way of action or lawful entry, so that a claim entered on the record of a fine, would now be ineffectual.

Action.

Braher's case,
2 Leon. 53.

An action commenced within five years after a fine has been levied, will be sufficient

Chap. XIV.  cient to avoid it, although judgment be not obtained within seven years after. But such action must be prosecuted with effect, for if an action be commenced within the time prescribed, and afterwards discontinued, it will not avoid a fine.

1 Vent. 45.

Fitzhugh's
case,
2 Leon. 221.

441. The suing out of a writ and delivering it to the sheriff does not amount to a pursuing of a claim or title by way of action, unless the writ be returned by the sheriff.

Comb. 249.

442. The action mentioned in the statute 4 Hen. VII. must be a real action; so that an ejectment will not avoid a fine.

2 Bl. Rep.
294.

443. A bill in chancery is not such a claim under the statute 4 Hen. VII. as will avoid a fine.

1 Chan. Ca.
268—278.
2 Bl. Rep.
394.

There is however an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, nor claim or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be by bill in chancery, as
the

the claim to avoid a fine, ought to be of a nature which corresponds with the estate.

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444. A fine may also be avoided by an actual entry made on the lands whereof the fine has been levied, provided the person who seeks to avoid the fine has a right of entry; but if the right of entry be taken away and a right of action only remains, as where a fine operates as a discontinuance of the estate, there an actual entry on the land will not avoid the fine, but a real action must be brought.

Entry.

1 Vern. 213.

445. Where an estate tail is discontinued, the estates in remainder and reversion expectant thereon are devested, and the persons intitled to such estates are barred of their entry, and driven to their action.

1 Inst. 332. b.
H. Black.
Rep. 269.

An estate tail may be discontinued by five different modes of conveyance. A feoffment, fine, recovery, release, and confirmation with warranty. But no person can create a discontinuance, who is not in the actual possession of the estate tail, by force of the intail.

1 Inst. 325. 2.

446. Where

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446. Where the original conveyance of an estate, is not by fine, but it is only levied as a confirmation of some prior conveyance, it will not in that case operate as a discontinuance, or take away the entry of the remainder-man.

Seymour's
case,
10 Rep. 95.

Lord *Cheney* being tenant in tail, with remainder in tail to *John Cheney*, Lord *Cheney* conveyed the premises by bargain and sale inrolled, to *William Higham* and his heirs, by force whereof he entered and was seised, and, in a year afterwards, he levied a fine with proclamations to the said *Higham* and his heirs, with general warranty. Lord *Cheney* died without issue, and *John Cheney* the remainder-man in tail, entered upon the premises. The question was, Whether his entry was lawful or not?

It was resolved that the entry of *John Cheney* was not taken away by the fine, because it did not discontinue the estate-tail, but only operated as a confirmation of the estate of the bargainee, which was originally determinable on the death of the tenant in tail; whereas the fine confirmed it as long as the tenant in tail had heirs of his

his body. It was agreed that if the fine had been levied before the bargain and sale was executed, it would have discontinued the estate-tail, and devested the remainder and reversion, by which means the entry of *John Cheney* would have been taken away; but the estate-tail not being discontinued, the remainder was not devested or turned to a right, so that *John Cheney* still continued in possession of it, and therefore the fine was no bar to him.

447. But where a fine is levied in pursuance of a covenant in a prior conveyance of an estate-tail, as where a tenant in tail conveys his estate by lease and release, and covenants in the release to levy a fine, which is done accordingly; in that case the lease and release and fine will be considered as one assurance, and will therefore operate as a discontinuance of the estate-tail.

A person being tenant in tail-male, with remainder over in fee, in consideration of a marriage, conveyed his estate-tail by lease and release to trustees and their heirs, to several uses, and in the release he covenanted to levy a fine to the same uses.

Doe ex dem.
Odiarne v.
Whitehead,
2 Burr. 724.

The

Chap. XIV. The marriage took effect and the tenant in tail levied a fine pursuant to his covenant.

On the death of the tenant in tail without issue, the remainder-man in fee made an actual entry upon the lands to avoid the fine, and then brought his ejectment.

The question was, Whether the plaintiff could maintain an ejectment.

It was contended that an ejectment might be maintained, unless a discontinuance could be proved; that from the authority of *Seymour's* case, the fine did not operate as a discontinuance, because it passed no freehold, the freehold having been conveyed by the lease and release before the fine was levied, which therefore only operated as a confirmation of the preceding estate.

But the Court of King's Bench were unanimously of opinion, that the lease and release and fine operated as one assurance and divested the remainder in fee; so that the plaintiff could not maintain his ejectment, but was put to his formedon, because

cause the operation of the deeds and fine ought not to be divided and considered distinctly, as that would defeat the intention of the parties and overturn a great number of family settlements: that the deeds of lease and release were incomplete until the fine was levied, and only operated as a declaration of the uses of the fine, so that the estate-tail passed by the fine: that this case was quite different from *Seymour's*, for in that case Lord *Cheney* did not levy the fine until a year after the bargain and sale was inrolled; and it was expressly found by the verdict that the bargainee entered, and was seised by force of the bargain and sale only; so that the bargain and sale was totally unconnected with the fine, nor did it appear that any fine was intended to be levied at the time when the bargain and sale was executed.

448. It should however be observed that there can be no discontinuance of things lying in grant, so that if a tenant in tail of a rent, advowson or common, levies a fine, or makes a feoffment with warranty, there is no discontinuance, for nothing passes but during the life of the tenant in tail, which is lawful; and as no

ⁱ Inst. 332.
^b.

Chap. XIV. { injury is done to the issue in tail, the remainder-man, or the reversioner, there is no discontinuance.

449. With respect to the mode of making an entry it must be on the land, and with an intention of claiming the freehold against the fine.

Anon.
Skin. 412.

A fine having been levied, the lessor of the plaintiff proved that at the gate of the house in question, he said to the tenant, he was heir to the house and land, and forbade him to pay more rent to the defendant; but he did not enter into the house when he made the demand, on which it was agreed that the claim at the gate was not sufficient. Then it was proved that there was a court before the house, which belonged to it, and that though the claim was at the gate, yet it was on the land and not in the street, and that was holden good without question.

Lit. f. 419.
1 Inst. 253.
b.

450. If a person is prevented by force or violence, from entering on lands whereof a fine has been levied, he must then make his claim as near the land as he can, which
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in that case will be as effectual as if he had made an actual entry.

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451. The delivery of a declaration in ejectment, does not amount to such an entry as will avoid a fine, even though the defendant appears to it, and confesses lease, entry and ouster, for there must be an actual entry made *animo clamandi*: whereas in an ejectment, there is only a fictitious or supposed entry, for the purpose of making a demise, and an actual entry must be made before the time when the demise is laid.

3 Burr. Rep.
1897.
Doug. Rep
463.

Upon a special verdict in ejectment, it was found that a fine had been levied of the premises in question; and that the lessor of the plaintiff entered into the premises with intent to make the demise in the declaration mentioned, but did not then make an actual entry for the purpose of avoiding the fine, but that after the demise laid the lessor of the plaintiff made an actual entry.

Berrington
v. Parkhurst,
2 Stra. 1086.
Andrews
125.
Brown's Ca.
in Parl.

It was insisted for the defendants, 1st. That an actual entry was necessary to avoid the fine. And 2d. That the demise could

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not be laid before the lessor had regained the possession by the actual entry. The Court was of opinion with the defendants on both these points; and on a writ of error in the House of Lords it was argued for the plaintiff, that a fine with proclamations does not, by force of the statute 4 Hen. VII. operate as a bar to conclude strangers till after five years elapse without entry or action; and therefore the verdict having found that the lessor of the plaintiff made his first actual entry after the demise laid, he thereby avoided the operation of the fine, and was at liberty to lay the demise in his declaration, which is a mere fiction of law, as early as he thought fit after his right accrued, in the same manner as if his title had stood independent of such fine, so rendered ineffectual within the plain intent of the statute: and if such entry was not good to maintain this demise, it must follow, that in every case where a fine is levied by a wrong-doer, and not discovered till two, three or four years afterwards, the intermediate profits between the time of levying such fine, and the entry of the lawful owner, must be absolutely lost, although the statute gives five years to enter, and an entry at any time

time within the five years, purges the disseisin and the wrong from the beginning, and brings the person so entering within the saving of the statute, to all intents and purposes.

On the other side it was said, that an actual entry is necessary to avoid a fine, before an ejectment can be brought, and it must also be before the time of the demise; because a fine is of that high nature, even at common law, that it dispossesses all persons claiming title, and consequently a lease to found the ejectment upon, cannot be made till the lessor regains the possession. As to the entries found by the verdict to have been made subsequent to the time of the demise, they were of no use in the present case; for the ejectment being originally void, could not be made good by any subsequent act; and therefore whatever effect those entries might have in other respects, they could not make the lease good. That the word *action* in the stat. 4 Hen. VII. has always been understood to mean real actions which were then in use; and it has often been determined, that the bringing an ejectment is not sufficient to avoid a fine.

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S P. Doug.
484.

It appears from Sir *John Strange's* report of this case, that the questions put to the Judges were, 1st, Whether an actual entry was necessary to avoid a fine? 2d, Whether the demise being laid before the time of the first entry, the ejectment could be maintained? To the first question they answered in the affirmative; to the second in the negative; upon which the judgment was affirmed.

2 Will. R. 45.

452. No entry is necessary where the fine is levied without proclamations, for the statute 4 *Hen. VII.* does not extend to such a fine, and therefore it may be avoided at any time within twenty years.

1 Inst. 258. a.

453. The entry to avoid a fine must be made by the person who has a right to the land, or by some one appointed by him; for a person who has a right of entry may empower another to enter for him. But if a stranger makes an entry on lands whereof a fine has been levied, in the name of a person who has a right to the land, without any preceding command or subsequent assent, within five years, by the person having right, it will not be sufficient; for the statute 4 *Hen. VII.* bars all persons who
do

do not claim within five years, by which means an election is given to all those who have a right at the time when a fine is levied to claim or not, and a stranger cannot make this election for them.


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A disseisor levied a fine with proclamations, the disseisee not knowing it; and a stranger made an entry within five years, to the use of the disseisee, but the disseisee did not assent to it, until the five years were expired. It was determined by all the Judges that the assent of the disseisee to the entry, after the five years had expired, was not sufficient to render it valid, because the statute of fines ought to be taken strictly, being made for the purpose of repose and tranquility.

Pollard v. Luttrell, Poph. 108. Moor 457. 9 Rep. 106. a. Cro. Eliz. 561.

454. A person in remainder or reversion expectant on a lease for life or years, or the lord of a tenant by copy, may enter in the name of the tenant for life, the tenant for years or the copyholder, to save those particular interests, as well as their own freehold and inheritance: and the entry of those particular tenants will also save the rights of the lord, the remainder-man, or reversioner, on account of the privity of

Shep. Tou. 33, 34. 9 Rep. 106. a

Chap. XIV.  estate which is between them. A guardian by nurture, or in focage, may also enter in the name of his ward to avoid a fine, and such an entry will save his right.

455. The entry of one joint-tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common.

456. By the statute 4 *Ann* c. 16. s. 16. it is enacted, " That no claim or entry to
 " be made of, or upon any lands, tene-
 " ments or hereditaments, shall be of any
 " force or effect to avoid any fine levied,
 " or to be levied with proclamations, ac-
 " cording to the form of the statute in that
 " case made and provided, in the Court of
 " Common Pleas, or in the Courts of Ses-
 " sions in any of the Counties Palatine, or
 " in the Courts of Grand Sessions in *Wales*,
 " of any lands, tenements or heredita-
 " ments; or shall be a sufficient entry or
 " claim within the statute of limitations,
 " unless upon such entry or claim an action
 " shall be commenced within one year
 " next after the making of such entry or
 " claim, and prosecuted with effect."

457. The

457. The proper mode of reversing a fine for any defect in the record is, we have seen, by writ of error: but where a fine is void *ab initio*, either as well to all mankind, or as to some particular persons, its effects may then be avoided by plea.

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Plea.
13 Vin. Ab.
335.

Thus where none of the parties to a fine have an estate of freehold in the lands whereof it is levied, such fine is totally void as to all strangers, and may be avoided by pleading, *quod partes finis nec eorum aliquis tempore levationis finis, nihil habuerunt, nec eorum aliquis habuit, &c. sed quidam J. S. cujus statum ipse habet.*

Dyer 215. b.
Co. Read. 12.
2 Inst. 525.

This mode of avoiding a fine seems to have been already established in the time of *Braeton*: *Excusatur etiam qui quod clameum non apposuerit, scilicet ubi finis ipso jure sit nullus, ut si factus fuit de tenemento quod alius tenuit, ut si ipse qui debuit clameum apposuisse, vel antecessor suus, fuit in seifina de eadem re quando finis factus fuit, et non ille vel antecessor suus qui finem allegat.*

Braet. 436. b.

458. The plea *quod partes finis nihil habuerunt*, might originally have been pleaded by any person who was not a party to the fine;

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Ro. Parl. v.
2. p. 122.

fine; and there is a very long case in the rolls of Parliament, 14 *Ed.* III. No. 31. in which it was determined, that a stranger should be allowed this averment. But by the statute 4 *Hen.* VII. parties and also privies to a fine are deprived of this plea; and as it is now determined, that the issue in tail are meant by the word privy, it follows, that they cannot avoid a fine on this ground.

Fraud.

Bra⁹t 43^{rb}.
437. 2.

459. By the common law a fine might be avoided on account of any fraud in the parties who levied it. *Excusatur etiam quis quod clameum non apposuerit, si finis factus fuerit per dolum et fraudem vel alio modo in alterius præjudicium, quod finis tenere non debeat.*

Hubert's
case, Cro.
Eliz. 53¹.
12 Rep. 123.
5—68. b.
Co. Read. 7.

Thus in 29 *Eliz.* one *Hubert* was convicted in the Star Chamber upon a bill exhibited against him for procuring one *Webster* to acknowledge a fine in the name of *Alexander Gellibrand* (who was then beyond sea). The sentence was, that he should be fined and imprisoned, and that the fine thus levied should be avoided (if it could be so done) by entering a vacat on the roll, or otherwise as the Justices of the

the Common Pleas should best approve; and if it could not be so made void, that then *Hubert*, by fine or otherwise, as *Gelibrand*, might devise, should re-convey the land to him and his heirs.

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460. Soon after the restoration, doubts were entertained respecting the power of Parliament to set aside a fine obtained by force and fraud.

A bill having been brought into the House of Lords to vacate certain fines unduly procured to be levied by Sir *Edward Powell* and *Dame Mary* his wife, the House commanded the Judges to deliver their opinions thereon in point of law: the Lord Chief Justice of the King's Bench delivered it as his opinion, and that of all the rest of the Judges, to be, "That they did not find by any record or precedent in their law books of any fine which had been perfected, that had been vacated for fraud or force in Parliament, or any other place." The question was then put, whether the fine was obtained by force? and it was resolved in the affirmative. The bill passed, but the following protest was entered, signed by Lord Chan-

Lords Journ.
v. 11. p. 191.
12 Car. 2.

Id. pa. 2 9

cellor

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cellor *Hyde* and several other Lords, "That
 " fines are the foundations of the assurances
 " of the realm, upon which so many titles
 " depend, and therefore ought not to be
 " shaken, nor hath there any precedent oc-
 " curred to us wherein any fines have been
 " vacated by judgment or act of Parlia-
 " ment, or otherwise without consent of
 " the parties; the eye of the law looking
 " upon fines as things always transacted by
 " consent, and with that reverence, that
 " no averment whatsoever shall be against
 " them when they are perfected."

Commons
 Journ. vol. 8.
 Pa 344.
 13 & 14 Car.
 2. c. 27.

In the House of Commons counsel were
 heard for and against this bill, and the
 House being satisfied that they had full
 power and jurisdiction of the cause, the
 bill passed.

3 Rep. 80. a.
 Shep. T. 18.
 Jenk. 254.

461. A fine may also be avoided by an
 averment of fraud, in consequence of the
 statute 27 *Eliz. c. 4.* where it appears to
 have been levied to secret uses, for the
 purpose of deceiving purchasers; or by
 an averment of usury under the statute
 13 *Eliz. c. 8.*

462. Al-

462. Although a fine duly levied is as effectual and binding in a court of equity as in a court of law, because it is one of the common assurances of the realm, and was originally instituted for the purpose of securing those who were in possession of lands; yet if any fraud or undue practice appears to have been used in obtaining a fine, the Court of Chancery has then a power of relieving against it, as much as against any other conveyance; for although it might be extremely improper and inconvenient to admit of an averment in a court of common law, against a fine obtained by fraud, because it would be dangerous to permit the evidence of a record to be questioned in any case whatever; yet as there is a method in which relief may be given in cases of this kind, without contradicting the principles of the common law, it is highly proper that a court of equity should adopt it, and the Lord Chancellor appears to have exercised this jurisdiction as early as the reign of Queen *Elizabeth*.

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Courts of equity.

Welby v. Welby, Tothil 99. 13 Vin. Ab. 373.

The Court of Chancery however does not absolutely set aside a fine so obtained, nor does it send the party aggrieved to the Court of Common Pleas to get it reversed; but

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but it considers all those who have taken an estate by such a fine, with notice of the fraud, as trustees for the persons who have been defrauded, and decrees a re-conveyance of the lands, on the general ground of laying hold of the ill conscience of the parties, to make them do that which is necessary for restoring matters to their situation. But with respect to any technical error in a fine, or irregularity of the commissioners who have taken the acknowledgment of it, it is a matter only cognizable in the Court of Common Pleas, because a fine being of the same nature as a judgment, is properly examinable in that court only where it is entered.

Wright v.
Booth,
Tothil 101.
St. John v.
Turner,
1 Ab. Eq.
259. 1 Vezey
289.

Coleby v.
Smith;
1 Vern. 205.

463. A bill was filed by one *Coleby*, to be relieved against a purchase made from the plaintiff's father, suggesting that he had been circumvented and imposed upon by the defendants. The defendants insisted on their purchase, and it appeared that there were, first, articles for the purchase under hand and seal, and some time after that, a conveyance actually made and executed in pursuance of these articles, and the purchase-money paid and secured; and after all this, a fine levied by the plaintiff's father

father to the purchaser. Lord Keeper *North*, upon the hearing of the cause, set the purchase aside, because there appeared to be some art used to persuade the plaintiff's father to sell the lands.

464. A person having prevailed on a woman to levy a fine of some houses, and to execute a deed declaring the uses thereof to himself and his heirs, it being proved that the woman, at the time of levying the fine, declared that she must make use of some friend's name in trust for herself, and she having afterwards declared in her will, that she only levied the fine for the better enabling her to dispose of her estate, and having devised it to *J. S.* subject to the payment of her debts: the Court of Chancery decreed, not only that the lands were liable to the debts of the testatrix, but also that the person to whose use the fine was declared, should convey the houses to *J. S.* according to the will.

Woodhouse v. Brayfield,
2 Vern. 307.

465. Where a fine is levied by a person who has got into possession under a forged deed, a court of equity will not allow it to have any operation.

2 Atk. 331.

466. If

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Idem 390.

466. If tenants give a conditional possession only, provided they may pay their rents to a third person, until a suit is determined: a fine levied under such a possession will not in a court of equity be allowed to have any operation.

2 Rep. 58. a.

10 Rep. 42. b.

12 Rep. 124.

Hobart 224.

1 Vezey 304.

467. By the common law, if an infant or idiot has by any neglect or contrivance been permitted to levy a fine, his declaration of the uses thereof will be good, so long as the fine remains in force; and if the fine is never reversed, his declaration of the uses will be binding and conclusive on him and his heirs for ever; because the law will not presume that a fine, which is a solemn act on record, has been levied by a person labouring under such disabilities, and therefore until the fine, which is the principal, is annulled, the declaration of the uses thereof will remain good. Thus stands the common law on this point; but as the Court of Chancery has, in many instances, compelled persons who had obtained estates under a fine in a fraudulent manner, to reconvey them to those who were really intitled thereto: so, that court will interpose its authority in cases of this kind, and not suffer the declaration of uses of a fine levied

Rushley v.

Mansfield,

Tothill 42.

ed

ed by an idiot to bar his heirs ; as no species of fraud can be more evident, than that of obtaining a conveyance from a person of this description.

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Thus, where one *Addison* by a first and second inquisition was found a lunatick in 1706 from the year 1689, without any intervals. The defendant had got a mortgage, and at last an absolute purchase at great undervalue, by deeds, fines, and recoveries ; the Court set aside the purchases.

Addison v. Dawson,
2 Vern. 672.

468. In the case of *Rochfort v. the Earl of Ely*, which was heard in the House of Lords in the year 1775, on an appeal from the Court of Chancery of *Ireland*, and of which the reader will find a full account in the appendix to the Essay on Recoveries, the House affirmed the decree of dismissal of the Court of Chancery of *Ireland*, upon the ground that the Earl of *Ely* had a sufficient capacity in law to do any act over his estates ; and not in consequence of any doubts respecting the jurisdiction of courts of equity to control the legal operation of fines and recoveries, or direct the uses of them according to equity and conscience.

7 Brown.

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469. A court of equity will not suffer a fine and non-claim to bar any charge on lands, where the person who levied the fine had notice of such charge.

Drapers' Company v. Yardley,
2 Vern. 662.

Thus where a person to whom lands were devised chargeable with legacies, levied a fine, on which there was five years non-claim, and afterwards granted a rent charge and mortgaged the lands. It was decreed that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of them.

470. A fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*.

1 Vern. 149.

Thus in the case of *Bovey v. Smith*, the Lord Keeper put this case to Serjeant *Maynard*,—"A. seised in fee in trust for B. for full consideration conveys to C. the purchaser having notice of the trust; and afterwards C. to strengthen his own estate levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C. having

“ having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for *B.* and so the estate not being displaced, the fine cannot bar.”

471. So in the case of *Shields v. Atkins*, 3 Atk. 562. Lord *Hardwicke* says, it would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of Lord *Pomfret v. Lord Windsor*, 2 Vezey 482. 2 Atk. 631. S. P. his lordship observed, that a court of equity would not suffer a fine levied by a trustee, to bar an equitable right: and that if a practice of this kind was suffered to prevail, a court of equity might as well be abolished by act of Parliament.

472. It is a principle of equity, that if a stranger enters upon an infant's estate and receives the profits, he shall be looked upon as a trustee for the infant. 1 Vern. 295. 2 Vern. 342.

Thus, where *A.* devised lands to trustees until his debts were paid, then to an infant and his heirs, the defendant entered on the
A a 2 estate
Allen v. Sayer, 2 Vern. 368.

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estate and levied a fine; five years past; the infant brought an ejectment as soon as he had attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery, where it was determined that although the fine and non-claim was a good bar at law, the legal estate being in the trustees who were of full age and ought to have entered, yet that the plaintiff ought not to suffer for their laches, being an infant. The court decreed the possession, and an account of profits, declaring the fine and non-claim should not run upon the trust in the infant's minority, nor he suffer for the laches of his trustee.

1 Vent. 32.

1 Lev. 272.

2 Vezey 482.

473. A mortgagor cannot bar a mortgagee by a fine and non-claim: for although the mortgagee be in reality out of possession, yet when that is done by the consent of both parties, and the nature of the contract requires it should be so, while the interest is paid: It would be against the original design of the contract, that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security.

474. A fine

474. A fine and non-claim by a mortgagee in possession will not, from the same principle, bar the equity of redemption. Chap. XIV.

Thus where a fine and non-claim was pleaded to a bill brought for the redemption of a mortgage, the plea was overruled. *Welden v. Dux. Ebor.*
1 Vern. 132.
2 Vern. 89.
Contra.

475. Where a fine is levied pursuant to a decree of the Court of Chancery, for a particular purpose, that Court will not permit it to operate farther than the decree directs. *Goodrick v. Brown,*
1 Chan. Ca. 49.
2 Vern. 56.

476. The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

Thus, where Sir *John Trevor*, in consideration of his marriage, entered into articles to settle his estate, to the use of himself for life, without impeachment of waste, remainder to his intended wife for life; remainder to the use of the heirs males of his body *Trevor v. Trevor,*
1 P. Wms. 622.
2 Brown 122.
Bingham v. Hussey,
Rep. in Chan. S. P.

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body by the said wife; remainder to his own right heirs; the marriage took effect, and Sir *John Trevor* had issue four sons, but no settlement was ever made pursuant to the articles.

Sir *John Trevor* supposing himself to be tenant in tail under the articles, levied three fines of the lands, and declared the uses of them to himself for life, remainder to his second son in tail, and afterwards died intestate, by which means a considerable real and personal estate devolved to his eldest son, who, notwithstanding, filed his bill, praying a specific performance of the articles. The second brother pleaded, among other things, the fines and five years non-claim; but it was decreed, that the lands comprised in the articles should be conveyed to the eldest son in tail, and this decree was affirmed in the House of Lords.

477. The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

Williams

William Lord Brereton being seised in fee of the impropriate rectory of *Middlewich*, and of the advowson and vicarage of the said church as appendant to the rectory, agreed with *Robert Lowe* to convey the same to him; and in pursuance of this agreement the said *William Lord Brereton* and *Elizabeth* his wife, and *William*, their son and heir apparent, in 1664 levied a fine *sur consauance de droit come ceo, &c.* in consideration of 1000*l.* therein mentioned to be the purchase money, in the court of the county palatine of *Chester*, to the said *Robert Lowe*, and to *Edward Minshall*, *Gabriel Hodgson*, and *John Wilson*, (who all three died in *Lowe's* life-time) and to the heirs of the said *Robert Lowe*.

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Holt v.
Lowe,
4 Brown 253.

About the year 1702, *Samuel Lowe*, the son and heir of *Robert Lowe*, presented a clerk to the vicarage of *Middlewich*, who was instituted and inducted, and continued in possession till his death, which happened in the year 1718, when *Francis*, Lord *Brereton*, presented his clerk to the vicarage, who was instituted and inducted. *James Lowe*, the respondent's brother, brought a writ of *Quare Impedit*, but before the matter was determined the incum-

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bent died, and the respondent, *Lowe*, presented his clerk, who was instituted and inducted. And the appellants brought their writ of *Quare Impedit*, to recover that turn of presentation, claiming the same under a conveyance from the family of *Brereton*.

The respondent, *Lowe*, having pleaded his title to the rectory and vicarage under the purchase and fine above-mentioned; the appellants in *Easter Term*, 1734, exhibited their bill in the Court of Exchequer against the respondent, setting forth that *William Lord Brereton* being minded to sell the glebe and tithes of the said rectory, the respondent's grandfather, who was then bailiff to Lord *Brereton*, prevailed on him, his lady and son, for some small sum of money, to sell and convey to the said *Robert Lowe* the glebe lands and tithes of the greatest part of the said parish; and other parcels of the said tithes were about the same time purchased by several other persons, and conveyed to them, and the said *Robert Lowe*, as part of the consideration for the purchase of the said tithes, agreed to take upon himself the payment of the stipend of nineteen marks to the vicar: but
neither

neither he nor his son ever pretended or insisted on any right to the advowson of the vicarage, nor ever attempted to present thereto, except in the year 1702, when *Samuel Lowe* taking advantage of *John Lord Brereton's* being then under a commission of lunacy, presented a clerk. The appellants therefore prayed that the respondent might discover whether there was not some deed wherein the uses of the fine were-declared, and whether a subsequent fine of particular parcels of the rectory was not levied in 1667, and deeds executed declaring the uses thereof.—In bar to this discovery the respondent pleaded the purchase so made by *Robert Lowe* his grandfather, and the fine thereupon levied to him of the said rectory, and the advowson of the said vicarage; and also the payment of the said sum of 1000 *l.* the purchase-money mentioned in such fine. That proclamations were duly made on the said fine, and that no claim was made to the premises within five years next after. That the respondent and those claiming under him, enjoyed the premises for fifty years and upwards, and insisted on the statute of Limitations.

On

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On the 9th of *November* 1734, this plea came on to be argued before the Barons, when they ordered that the plea should be allowed.

An appeal was then brought in the House of Lords, and on behalf of the appellants it was argued, that the fine insisted by the plea to have been levied to *Robert Lowe, Minshall, Hodgson, and Wilson*, was not levied with an intention to convey the rectory to the conusees for their own use, but only to clear the title to the rectory, which was then intended to be sold in parcels; and as there did not appear to be any declaration of the uses of this fine, it would, by the rules of law, result to the conusors. That the end of the bill was to discover the intent and design of the said fine, and of a subsequent fine, said to have been levied in 1667 to the said *Robert Lowe*, of divers parcels of the said rectory; and by the discovery of this second fine, and the uses of it, and the consideration of such conveyance, to shew that the uses of the first fine did result to the conusors, or at least, as to such parts of the rectory as were not particularly conveyed by the second fine, and the deeds declaring the uses of it; and there-

therefore the first fine ought not to have been pleaded in bar to such discovery, without a denial of the particular circumstances charged by the bill, as an evidence of such resulting use. That the respondent, by not answering or denying the several charges in the bill, touching the second fine, and the declaration of its uses, did implicitly admit the same, and that the advowson of the vicarage was not comprized therein; and this admission was a strong evidence against him to shew, that the first fine was levied only for the purposes above-mentioned, and that nothing more was intended to pass to his ancestor, than what was particularly comprized in the second fine, and the declaration of the uses thereof. That it did not appear by the plea, what was the real purchase-money of the advowson, nor that the same was paid by *Robert Lowe*, the respondent's ancestor. That the appellants and the respondent derived under the same title, and the right of the appellants to the advowson appeared from the respondent's own conveyances; the pretence therefore of his ancestor's being a purchaser, without any notice of the appellant's title, was without foundation. And as to the quiet enjoyment,

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ment, the fine and non-claim, and the statute of Limitations, set up as a bar to the discovery sought by the appellants; it was said, that as to the glebe, and such part of the tithes, parcel of the said rectory, as the respondent claimed, there might have been a long and quiet possession, nor was his title thereto at all impeached by the appellant's bill; but as to the advowson of the vicarage, the only evidence of enjoyment insisted on by the respondent, was a presentation about the year 1702, which was during the lunacy of Lord *John*; and since that time Lord *Francis*, his heir, presented the last incumbent, and regained the possession of the vicarage. It was therefore hoped, that the said plea should not bar the appellants of a full discovery of the respondent's title; but that the order for allowing the same should be reversed.

On the other side it was contended, that *Robert Lowe*, the respondent's grandfather, and under whom he claimed, was a purchaser of the rectory and the advowson of the vicarage, by the fine levied in 1664, for 1000 *l.* without any notice of any other title; and therefore, by the known and established rules and practice of courts of equity,

equity, the respondent ought not to be obliged any further to discover or disclose his title; nor were the appellants entitled to the aid of a court of equity in respect to such title. That by the fine, proclamations, and non-claim thereupon, and by the length of peaceable possession and enjoyment, which the respondent's grandfather, father and brother, and those claiming under them, had successively of the said advowson, under the said fine and purchase; the title under which the appellants, by their bill, claimed the same, was utterly and effectually barred and defeated both at law and in equity; and therefore the order for allowing the plea ought to be affirmed, and the appeal dismissed with costs.

After hearing counsel on this appeal, it was ordered and adjudged, that the order therein complained of, should be reversed; and that the plea should stand for an answer, with liberty to except so far, as to oblige the respondent to discover any conveyance or conveyances made by *William Lord Brereton* and *Elizabeth* his wife, and *William Brereton*, Esq; their son, or any or either of them, to *Robert Lowe*, the respondent's grandfather, alone, or jointly, with any
other

Chap. XIV.  other person or persons; and to discover any deed or deeds, declaring the uses of a fine, in the pleadings mentioned to be levied in the 16th year of King *Charles II.* or declaring the uses of a fine in the pleadings also mentioned to be levied in the year 1667.

478. Although a bill in equity is not such an action as will avoid a fine, if the subject-matter of the suit be of legal jurisdiction: yet still in some instances, the filing a bill in a court of equity, will prevent the bar arising from a fine and non-claim: and in cases of this kind the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim, upon the same principle that a court of equity sometimes directs that the defendants in a suit at law, shall not plead the statute of Limitations.

2 Atk. 389,
390.

Pincke v.

Thornycroft,
Brown's Rep.
in Chan. 289.
Printed Cases
Dom. Proc.
1784.

Sir *John Thornycroft*, Bart. being intitled to the remainder in fee of the estates in question, expectant on the decease of his sister *Elizabeth*, the then wife of General *Handasyde*, devised the same to *Henry Forster* in fee. After the decease of Sir *John Thornycroft*, disputes arose between

Mrs.

Mrs. *Handasyde*, who was heir at law of Sir *John Thornycroft* and Mr. *Forster*, respecting the validity of this will, which were compromised, and Mr. *Forster*, in consideration of 630 *l.* conveyed all his interest in the estates devised by the said will to General *Handasyde* and his wife in fee as joint-tenants. Mrs. *Handasyde* survived her husband, and having no issue, she devised among other estates, "her estate and "manor of *Stockwell*, in the parish of *Lambeth*, in the county of *Surry*, and all there- "unto belonging, to *Henshaw Thornycroft*, "and his heirs male, and appointed him "her executor." Upon the death of Mrs. *Handasyde*, *Henshaw Thornycroft* entered into possession of all the estates whereof she was seised, among which was a farm situated in the parish of *St. Mary Newington*, but which was not within the manor of *Stockwell*, and therefore did not pass by the will, and in *Hilary* term 1773, levied a fine and suffered a recovery of all those estates, in order to bar the entail.

Previous to this, *Elizabeth Pincke* and *Ann Thornycroft*, who were the heirs at law of Mrs. *Handasyde*, filed their bill in the Court of Chancery against *Henshaw Thornycroft*,

Chap. XIV. *croft*, praying, that the said *Thornycroft* might set forth the dates and short contents of all the deeds, evidences, and writings in his custody or power, relating to the estates whereof Mrs. *Handasyde* died seised; and that he might likewise set forth and discover of what lands of the said Mrs. *Handasyde* he was in possession, which were not comprised in her will, and for an account of the rents and profits of the said premises received by him since the decease of Mrs. *Handasyde*, and for a delivery of all deeds relating thereto.

The defendant by his answer denied being in possession of any estates belonging to Mrs. *Handasyde*, but what were comprised in her will.

The heirs at law soon after discovered, that the farm at *Newington* was not devised by the will, and therefore brought an ejectment for the recovery of it. Notice of trial having been given just before the summer assizes 1778, a few days before the trial was to come on, the solicitor for the defendant informed the solicitor for the plaintiff of the will of Sir *John Thornycroft*, and that the production of that will, and setting up the

the title of *Henry Forster* under it, would non-suit the plaintiff in ejectment, but did not mention the fine or the deed by which *Forster's* title was conveyed to Mrs. *Handasyde*, that deed being in fact not then discovered. The heirs at law gave notice of trial for the Lent assizes 1779, when *Henry Thornycroft* set up the fine and non-claim; and there having been no actual entry, the plaintiffs were nonsuited. Upon this the plaintiffs filed a bill of revivor and supplement, praying, that under these circumstances the defendants might be restrained from setting up the fine in any manner to the prejudice of the plaintiffs.

The case was heard before the lords commissioners, *Loughborough*, *Ashturst*, and *Hotham*; and on behalf of the plaintiffs it was contended, that they should have proceeded to trial at the summer assizes 1778, which was before the expiration of the five years, if they had not been prevented by the information of the solicitor; and therefore this was a proper case for the interference of a court of equity. They insisted further, that the filing of the bill in the court of Chancery was of itself sufficient to prevent the bar, arising from the fine and non-claim taking place.

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For the defendants it was urged, that there was no impropriety in the solicitor's conduct; that the court would not interfere to prevent the operation of a fine, unless in cases of fraud; and that the bill being in substance a mere bill for discovery could not operate to prevent the bar arising from the fine.

Lord *Loughborough*.—"If it were made
 " out that the plaintiffs were prevented
 " from trying their cause by fraud, I should
 " think, under the principles of this court,
 " the defendants ought to be restrained
 " from setting up the fine as a bar; but
 " here the plaintiffs take it for granted,
 " that a bill filed in this court for any pur-
 " pose, will prevent the statute of limita-
 " tion, or a fine barring. All legal interests
 " are bound by the fine: if the subject
 " matter of the suit be of legal jurisdiction,
 " the bringing a suit in equity will not bar
 " the operation of the fine. If a demand
 " of a debt be made here, if it be a legal
 " debt, this court being applied to for a
 " discovery, will not prevent the statute
 " of limitations from running; but if it be
 " for payment out of assets, for which this
 " is the proper jurisdiction, there the filing
 " of

“ of the bill is the commencement of a
 “ proper suit. I do not say, that a case
 “ may not exist where the bad faith of
 “ parties may make a ground to prevent
 “ a fine from barring; but here was only a
 “ communication of the truth of the case;
 “ the attorney stated all he knew: it was
 “ not his duty to give notice of the fine: it
 “ was not in proof that it was in consequence
 “ of this they did not try the cause. It
 “ was their own judgment that decided up-
 “ on it. A legal bar has taken place in
 “ in consequence of a legal provision,
 “ whether that provision be wise or not, it
 “ must bind. No hardship has occurred,
 “ in consequence of which they can say,
 “ that in conscience the fine should not be
 “ set up. This is a legal title, over which
 “ this court has no jurisdiction, and no
 “ fraud has intervened. The bill must
 “ therefore be dismissed.”

Lord Commissioner *Ashurst*.—“ I am
 “ of the same opinion,—where a bill is
 “ filed, with a prayer for equitable relief,
 “ the policy of the law suspends the statute
 “ of limitations; just as in the case of the
 “ commencement of an action.—But with
 “ respect to a fine the case is different, the

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“ bringing an action is not sufficient to
 “ bar the operation without an actual en-
 “ try ; no more can the bringing a suit
 “ here be so, unless the entry was prevent-
 “ ed by fraud. In any other case the
 “ filing the bill cannot prevent the bar, and
 “ in this case there was no fraud, but a fair
 “ disclosure.”

Lord Commissioner *Hotbam*,—“ If the
 “ filing of the bill is not a sufficient bar, it
 “ will stand on the circumstances of the
 “ case. It was a mere bill of discovery,
 “ which is not sufficient. If the circum-
 “ stances are such, that there had been an
 “ imposition on the party, I think the court
 “ should interpose, but it was a fair candid
 “ conversation.” The bill was dismissed.

Printed Cases
 1784.

An appeal was brought from this decree to the House of Lords, and on behalf of the appellants it was said, that it belongs to the jurisdiction of courts of equity, not only to give relief where the party intitled to the lands has a title only in equity, but also where the plaintiff in equity has the legal estate, and can recover at law, provided the deeds which are evidence of his title are in the hands of the defendant in possession.

session of the lands. The court in such cases relieves by decreeing a production of the deeds upon a trial at law, by restraining the defendant from setting up satisfied terms; and (in case an account of the rents is also prayed) will, after a recovery at law, by the aid of the court, decree an account of rents and profits. In like manner where the plaintiff has the title at law, and can make it out at law, without any aid from deeds in the defendant's hands; yet if the defendant has in his hands an instrument which will defeat the plaintiff's legal title, and has also another instrument in his hands which will restore the plaintiff's title, equity will either decree the defendant not to give the first instrument in evidence at law, or to produce both. This is the present case; for the plaintiffs, as heirs of *Elizabeth Handasyde*, could make out their title at law to the lands, which did not pass by her will, without any aid, by proving their pedigree: but it was in the power of the defendant to nonsuit the plaintiffs, by shewing, that Sir *John Thornycroft* was in his life-time seised of the estate in question, and that he devised it to *Forsier*, whereby *Elizabeth*, his sister and heir at law, was disinherited. But by the conveyance of

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1745 from *Forster* to *Elizabeth* in fee simple, and the production of it at law, the plaintiffs would be reinstated in their title as heirs to *Elizabeth*. The original bill was brought for a production and inspection of all the title deeds by the heirs of *Elizabeth Handasyde* against the devisee, to which production the heir was intitled. And the plaintiffs presuming that some aid of the court might appear to be finally necessary to try the title at law, the bill prayed an account of rents and profits and delivery of the deeds belonging to the descended estates. In the course of pursuing and obtaining this discovery, it came out, that Sir *John Thornycroft* the son made a will, and devised to *Forster*, and it also came out by the last answer, that *Forster* had conveyed to *Elizabeth Handasyde* in fee. It also came out that the lands in question were comprised in an old settlement 1722, and in a term of five hundred years thereby created for raising annuities, which had been satisfied, but the term remained outstanding; subject to which term, Sir *John Thornycroft*, the son, took the lands in question. So that it was undoubted, that if there were no other circumstances in the case, the court had a jurisdiction, and should have decreed
upon

upon the hearing of the cause, that the bill should be retained, with liberty for the plaintiff to bring an ejectment, that the defendants, the devisees, should not set up the term of five hundred years; and, in case the will of Sir *John Thornycroft*, the son, should be produced in evidence, the defendants should likewise produce at the trial the deed of 1745, and that all further directions should be reserved till after the trial was had.

The only circumstances in the present case which differed from the above, and which were the grounds of dismissing the bill, were, that in *Hilary* term 1773, (the next after the death of *Elizabeth Handasyde*) the devisee levied a fine of all the devised estates, and also of the descended estates (having entered upon both immediately after her death.) The original bill was filed in 1776. The five years non-claim ran from *Michaelmas* 1778. In *October* 1781, the answer came in which discovered the deed of 1745, and admitted it to have been in the hands of the devisee from the time of the death of *Elizabeth Handasyde*; and the answer also stated and insisted upon the fine and non-claim. The cause was

Chap. XIV. heard the first of July 1783, at which time the court should have added to the directions above-mentioned, That the fine and non-claim should not be insisted upon at law, instead of dismissing the bill upon the ground of such fine and non-claim only, as the non-claim had elapsed pending the suit in Chancery, and therefore the court ought not to have permitted the defendant to take advantage of it at law.

For a court of equity will not suffer the rights of the parties to be changed, pending the suit in a case within the jurisdiction of the court, and where the court can relieve; therefore if a trust estate is before the court in a *lis pendens*, and a sale be made of the trust estate, without actual notice of the cause to the purchaser, the court at the hearing will decree the relief against the purchaser, which the plaintiff in the cause was intitled to. But it is otherwise after the cause is at an end, for then the party must have express notice of a decree, as he must of a judgment at law, to affect him with equity. So in the case of a fine, equity will not suffer a non-claim completed, pending the cause, to prevent the court from doing equity; otherwise (as Lord
Hardwicke

Hardwicke expressed it in 2 *Atk.* 390.) it would trip up the jurisdiction of this court, if you will not allow (where it is a proper matter of equity) a bill to prevent the running of a fine. So where a court of equity has directed an action, the defendant has been restrained from setting up the statute of limitations, which has run pending the suit in equity.

On the other side it was contended, that the title of the appellants, if they ever had any, was a clear title at law; it needed no assistance of a court of equity to bring it to a fair discussion: and accordingly the mother of the appellant *Pincke* and the appellant *Thornycroft* brought an ejectment, which might have been fairly tried without any such assistance; and there was now no obstacle to a legal determination of the rights of the appellants, except the fine.

That there was no ground for a court of equity to interpose, to remove the legal bar created by the fine. It was apprehended the farm at *Newington* was devised by the will; but supposing the contrary, there was not in the case any circumstance which could give a court of equity a controul over
the

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the legal title of the respondents, nothing which could form a legal obligation upon their conscience, not to set up the fine. The appellants attempted to impute fraud to the respondents or their solicitor; but the bill did not state such a case as warranted the imputation, much less was it made out in proof. A fine was a matter of record open to the inspection of every one; the legislature had given it an operation to bar all claims not asserted in due time, and it was therefore the duty of every person having a claim, to inform himself whether there might be such an impediment to the assertion of it. Not disclosing to an adversary that a fine had been levied, which might in time be a bar to his claim, could not be deemed a fraud. It was endeavoured, therefore, to give to the conversation of the solicitor for the defendant and the solicitor for the plaintiff in the ejectment (of which there was no evidence but the answers) such a turn as might make it appear something like fraud. But the solicitor for the defendant merely mentioned a claim made by persons to whose apparent title he was then unable to give any answer, and which had therefore excited in his mind much apprehension for his client's

client's title; and what he communicated was not only true, but (according to the information he then had) was the whole truth, though a subsequent accidental discovery put an end to this alarming claim, which, if it had prevailed, was superior to the title of the heirs, as well as of the devisee of Mrs. *Handasyde*. It was true, the heirs countermanded their notice of trial of the ejectment, but their own judgment decided their conduct.

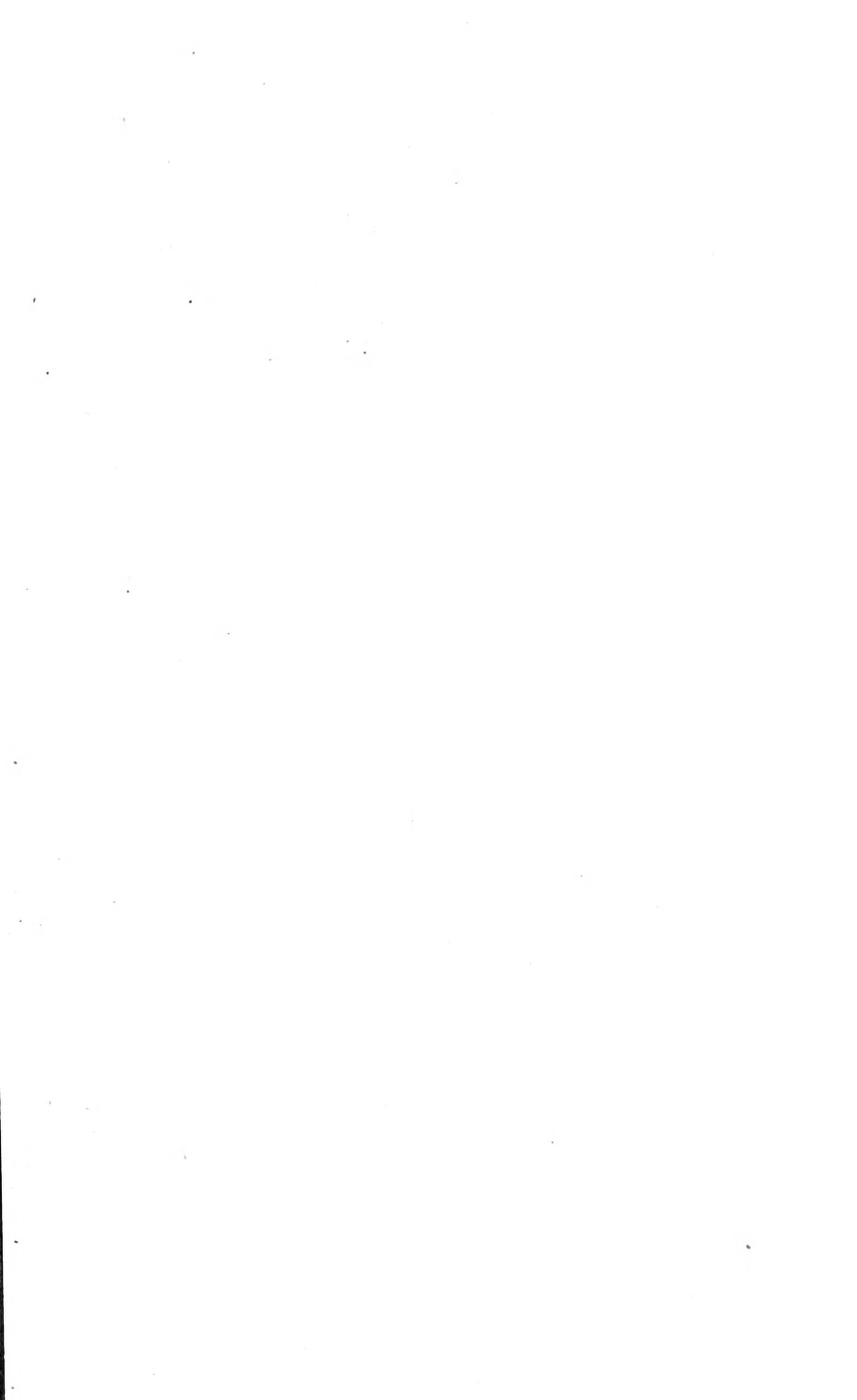
It was asserted by the appellants, that if the ejectment had proceeded to trial, the fine must have been discovered, and five years not having then elapsed from the last proclamation, the heirs might have entered to avoid the fine. But this assertion was not founded in truth; the will of Sir *John Thornycroft* would have been a sufficient defence, and there would have been no necessity for setting up the fine.

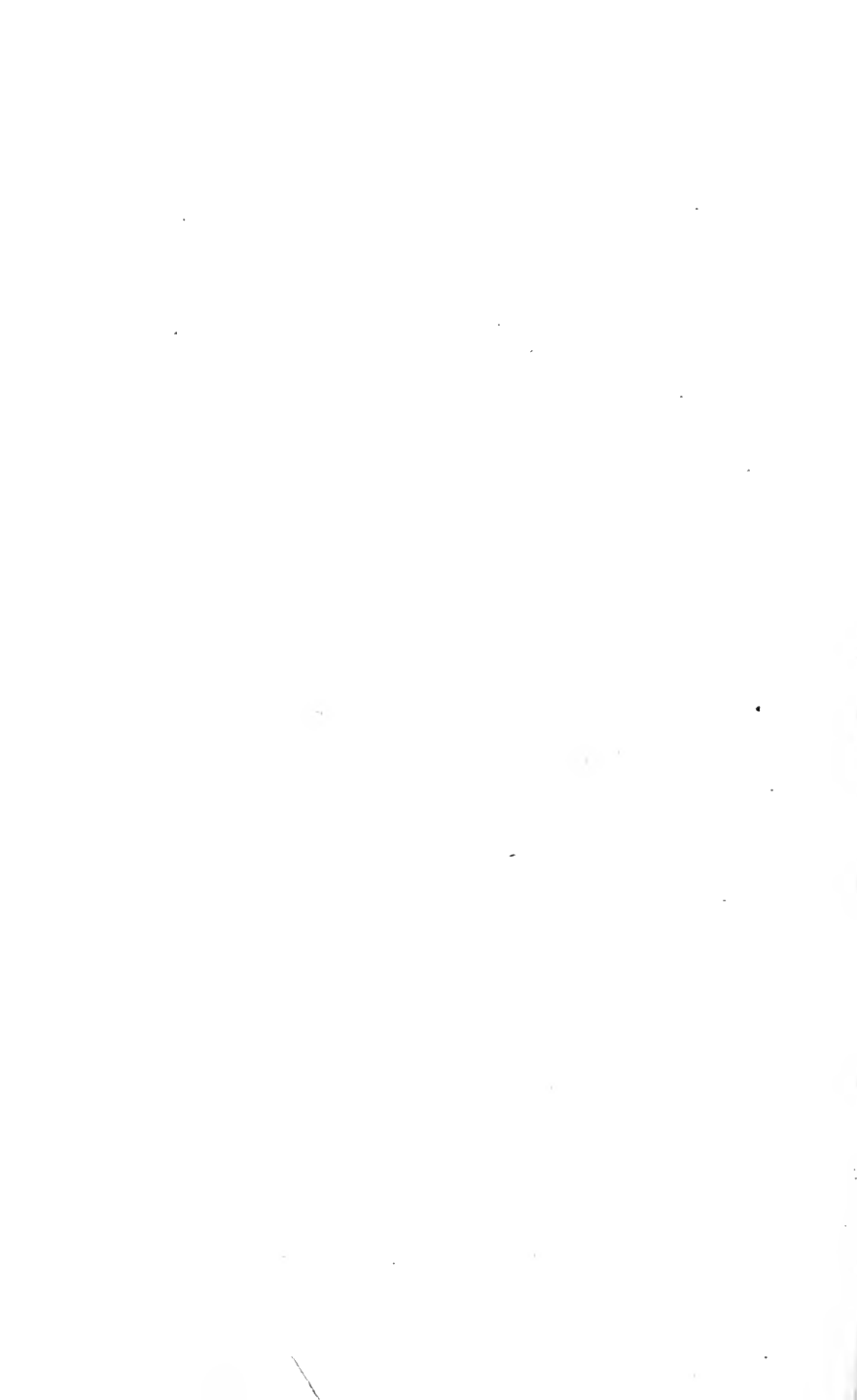
It was ordered and adjudged, " That 28th Feb.
 " the said decree or order of dismissal 1785.
 " complained of in the said appeal should
 " be reversed. And it was further order-
 " ed and adjudged, that the bill should be
 " retained for twelve months, and that the
 " plain-

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“plaintiffs should be at liberty in the
“meantime to bring such action or actions
“at law as they should be advised, &c.
“And it was further ordered and adjudged,
“that the said defendant *Edward Thorny-*
“*croft* should not insist in such action or
“actions, or on any trial to be had there-
“on, on the fine mentioned in the plead-
“ings, or on any non-claim which had
“ensued thereon, or any other fine or non-
“claim which might have incurred since
“filing the original bill.”

END OF THE FIRST VOLUME.





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